APPENDIX

Judgment

Extract from the Minutes of June 29, 1957.

No. 15884

HUMBLE OIL & REFINING COMPANY,

VERSUS

FEDERAL POWER COMMISSION,

This cause came on to be heard on the petition of Humble Oil & Refining Company for a review of an order of the Federal Power Commission issued on September 9, 1955, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order of the Commission in this cause be, and the same is hereby, affirmed.

"Brown, Circuit Judge, dissenting."

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15884

HUMBLE OIL & REFINING COMPANY,
Petitioner,

VERSUS

FEDERAL POWER COMMISSION,
Respondent.

PETITION OF REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION, SITTING AT WASHINGTON, D. C.

(June 29, 1957.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BORAH, Circuit Judge: This is a companion case to the two cases we have decided today in Numbers 15,849—*Deep South Oil Company of Texas* v. *Federal Power Commission*, and 15,900—*Shell Oil Company* v. *Federal Power Commission*, in that petitioner herein has invoked the jurisdiction of this Court under Section 19(b) of the Natural Gas Act to review and set aside the order of the Federal Power Commission which is the subject also of review in those cases.

Petitioner's basic contentions and the grounds asserted for setting aside the Commission's order are in essence identical to those urged by petitioners in the two companion cases. Consequently, and by reason of the circumstance that the facts in this case present an identity of

legal principles with those involved in the *Deep South* and *Shell* cases, *supra*, what we have said in those cases is dispositive of this case. Accordingly, and for the reasons there stated at length, we conclude that the order of the Commission declaring Humble Oil & Refining Company to be a "natural-gas company" within the meaning of the Act, must be and hereby is affirmed.

AFFIRMED.

BROWN, Circuit Judge: I dissent for reasons hereafter to to be filed.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15849

DEEP SOUTH OIL COMPANY OF TEXAS

Petitioner,

VERSUS

FEDERAL POWER COMMISSION,

Respondent.

PETITION OF REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION, SITTING AT WASHINGTON, D. C.

(June 29, 1957.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BORAH, Circuit Judge: This case comes to us on the petition of Deep South Oil Company of Texas to review, pursuant to Section 19(b) of the Natural Gas Act,[1] order

---

[1] 15 U. S. C. § 717r(b).

of the Federal Power Commission determining that Deep South is a "natural-gas company" as that term is defined in the Act.[2]

Deep South is a small, unintegrated corporation engaged in the exploration for and the production of oil and gas. Its properties are located in the State of Texas, and its oil and gas facilities consist only of oil and gas well equipment, including flow lines, heaters and separators, together with such valves, tanks, and meters as are required for the operation of its wells and lines. As revealed by the record before us, Deep South owns or has an interest in and operates fourteen wells in the Big Hill Field located in Jefferson County, Texas. Five of these wells produce "casinghead gas"[3] and nine produce "full stream" or "gas well gas,"[4] and all of the gas from these wells which is not used in the field for drilling purposes by Deep South or other operators is sold to Texas Gas Corporation pursuant to a contract which was executed on February 15, 1952, for a term of twenty years. This agreement by its terms provides that the leases and lands which Deep South owns or acquires in the Big Hill area are "dedicated" to the performance of the contract, and that the gas shall be

---

[2] By Section 2(6) of the Natural Gas Act "natural-gas company" is defined to mean "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

[3] "Casinghead gas" is gas that is produced along with oil from an oil well and ordinarily consists of fixed gases, principally methane in bulk with other hydrocarbons ranging from the lighter ones down to the quite heavy ones. Mixed with those hydrocarbons are water vapor, acid gases, hydrogen sulphide and carbon dioxide, in addition to other fairly common diluents such as nitrogen, helium, and various sulphur compounds, and impurities such as drilling mud, rust, sand and dirt.

[4] "Full stream gas wells," "straight gas wells," and "gas distillate wells" are synonymous terms and the gas produced therefrom is "gas well gas," which contains fewer liquefiable hydrocarbons than gas produced in association with oil.

delivered at each of Deep South's wells located on the dedicated leases in a full stream, *in its natural state, without the extraction therefrom of any gasoline or other liquefiable hydrocarbons.*[5] Prior to delivery under the contract, the "casinghead gas" is separated from the oil with which it is produced at a field separator, and the "full stream gas" is treated for the removal of water at a so-called "free-water knockout." Within a few feet from the point at which the gas leaves the aforementioned mechanical devices, it passes into Texas Gas' meters which are located on the leases near the wellheads from which the gas is produced. There it is measured and delivered and title thereto passes to Texas Gas. Thereupon the gas then moves from these metering points through a network of converging pipelines of progressively larger size to the purchaser's processing plant at Winnie, Texas, which is located about seven miles from the Deep South leases. During the course of this movement, the gas purchased from Deep South is commingled in the pipelines with gas which Texas Gas has purchased from other operators in the area. At the Winnie processing plant all of the casing head gas and gas well gas purchased by Texas Gas is processed for removal of water vapor and liquefiable hydrocarbons. After processing, the gas is discharged into a common sales header and pursuant to a contract between Texas Gas and Texas Eastern Transmission Corporation a portion of such gas flows into the latter's interstate transmission lines for transportation and resale in interstate commerce. This contract between Texas Gas and the pipeline company is for a minimum of fifteen years and by its terms the gas purchase contract between Deep South and Texas Gas and the gas which may be produced from the lands and leaseholds covered thereby are "dedicated" to the performance of the contract between Texas Gas and Texas Eastern.

---

[5] All italics herein ours.

The proceeding before the Commission which gave rise to this petition for review was initiated by Deep South when, in conformity with Rule 1.7(c) of the Commission's Rules of Practice and Procedure, it filed a petition for a declaratory order[6] in which it requested the Commission to declare that petitioner's sales of natural gas to Texas Gas are not subject to regulation under the Natural Gas Act, 15 U. S. C. §§ 717-717w, and that petitioner is not a "natural-gas company" within the meaning of the Act or subject to the provisions of the Commission's Order No. 174-A.[7] This proceeding, Commission's Docket No. G-2952, was consolidated for the purposes of hearing with proceedings on two similar petitions filed by Shell Oil Company and Humble Oil & Refining Company, Commission's Docket Nos. G-4671 and G-5261, respectively. After a hearing and upon the facts of record, the presiding examiner decided that petitioners' sales of gas, and each of them, were sales in interstate commerce of natural gas for resale within the purview of the Natural Gas Act, and that by reasons of such sales, each of the petitioners was a "natural-Gas company" subject to regulation under the provisions of the Act. Accordingly, petitioners' respective prayers for declaratory relief were denied.

---

[6] In its amended and supplemental petition Deep South sought declaratory relief from the Commission with respect to a sale made from a single gas well in Refugio County, Texas. Subsequent to the hearing before the presiding examiner this well became exhausted, the equipment was dismantled and all deliveries of gas from the well discontinued. For that reason, Deep South withdrew its request for relief with respect to this well, the withdrawal being made at the time of the argument before the Commission. The Commission's opinion and order contain references to this well, but the questions relating to it are now moot and are not referred to in Deep South's petition for review or discussed in its brief.

[7] See *Magnolia Petroleum Company* v. *Federal Power Commission*, 5 Cir. 236 F. 2d 785, cert. denied 352 U. S. 968, for a discussion of Order No. 174-A.

Deep South, Shell, and Humble Oil thereupon filed exceptions to the decision of the presiding examiner and the Commission, after hearing oral argument thereon, issued on September 9, 1955, its Opinion No. 284 and accompanying order affirming the decision of the examiner for the reasons therein stated. In its opinion the Commission noticed the fact that these consolidated proceedings presented to it for the first time the question whether sales of natural gas made before the completion of "production and gathering" are exempt from the Natural Gas Act by reason of the exclusionary provision of Section 1(b) of the Act. In resolving this question the Commission rejected petitioners' claims that "casinghead gas" is not "natural gas" within the meaning of the Act, and expressly affirmed the examiner's conclusion that there is nothing in the Natural Gas Act which supports petitioners' assertion that regulation under the Act is confined to fuel gas which consists "almost entirely of methane and ethane." Likewise, the Commission concluded that there was no merit in the contention that the sales in question are for "manufacture" and not for "resale." And, on the basis of its finding that the entire movement of the gas from the producing wells through the processing plants to consumers in other states is an uninterrupted and continuous flow, the Commission determined that the gas which is sold by petitioners is sold "in interstate commerce." Finally, the Commission concluded that none of the sales is exempt from regulation under the Act for the reason that the exemptive language of Section 1(b) does not nullify the clear and specific grant of jurisdiction over "sales of natural gas in interstate commerce for resale." Thereafter and agreeable to the provisions of Section 19(a) of the Act, petitioners filed applications for rehearing of this order, which applications were on November 4, 1955, denied by order of the Commission. Whereupon, Deep South, Shell, and Humble Oil, each filed a petition

for review,[8] praying that the orders of September 9 and November 4, 1955, be set aside in their entirety and that this Court further determine and declare that petitioner is not a "natural-gas company" within the meaning of the Act and that its sales are not subject to the jurisdiction of the Commission.

In this review proceeding as in the proceeding which was had before the Commission, Deep South raises two issues. The first and principal point urged is that the sales made by it are not within the specific affirmative grant of jurisdiction to the Commission over sales "in" interstate commerce, for the reason that all of the relevant circumstances establish that they are "local" in character. We do not agree. In our opinion the statutory language, its legislative history and prior decisions of the Supreme Court compel a contrary conclusion. When the Act was passed in 1938, Congress declared the national policy in doing so as follows:

> "Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."

In the hearings which were had before the House Committee on Interstate and Foreign Commerce prior to the adoption of the Act, Congress was fully informed as to

---

[8] Shell Oil Company's petition for review has been docketed as cause No. 15,900 and Humble Oil & Refining Company's petition has been docketed as cause No. 15,884. The three cases were consolidated for purposes of argument and submission by order of Court entered June 25, 1956, however, separate opinions and judgments will be filed and entered in each case.

the need for such regulation and among other considerations it was cognizant of the fact that the prices at which local distributing companies can sell gas are in very large part determined by the prices they are required to pay for the same to interstate pipeline companies. It was strongly urged to Congress that the public cannot be protected from exploitation in the prices charged for natural gas unless Government shall control not only the price charged by the companies which deliver the gas to the consumer, but also the prices of all companies which cooperate in bringing the gas from the wells in the state of production to the ultimate consumer in the state of distribution.[9] The Committee reports on the bill which became the Natural Gas Act specifically stated that "sales for resale, or so-called wholesale sales in interstate commerce *(for example, sales by producing companies to distributing companies)* . . . have been considered [by the courts] to be *not local in character*, and even in the absence of Congressional action not subject to State regulation."[10] Accordingly, Congress provided in Section 1(b) of the Act the following:

> *"The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption . . . and to natural-gas companies engaged in such transportation or sale,* but shall not apply to any other transportation or sale of natural gas . . . or to the production or gathering of natural gas."

"Natural gas" is defined in Section 2(5) of the Act to mean "either natural gas unmixed, or any mixture of natural or artificial gas," and in Section 2(7) "interstate commerce" is defined as "commerce between any point in

---

[9] Hearings before House Committee on Interstate and Foreign Commerce on H. R. 4008, 75th Cong., 1st Sess., p. 142.

[10] H. R. Rep. No. 709, 75th Cong., 1st Sess. 1-2; S. Rep. No. 1162, 75th Cong., 1st Sess., 1-2.

a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States."

In numerous decisions, the Supreme Court has recognized that the Act was primarily designed to protect consumer interests against exploitation at the hands of private natural gas companies, and with particular reference to sales by independent producers the Court, in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 682, said:

> "... we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company."

And in emphasizing the purpose of the Natural Gas Act to protect consumers, the Court at page 685 observed that:

> "Regulation of the sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from the regulation of such sales when made by an affiliate of an interstate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act. *Federal Power Commission* v. *Hope Natural Gas Co., supra*, at 610. Attempts to weaken this protection by amendatory legislation exempting independent natural-gas producers from federal regulation have repeatedly failed, and we refuse to achieve the same result by a strained interpretation of the existing statutory language."

Having in mind the obvious purpose of Congress which was to see that there was effective regulation of all inter-

state wholesale sales of natural gas, it would be an exceedingly incongruous result if a statute so motivated and planned to bring about such regulation were construed so as to obtain the opposite result. To hold, as petitioner would have us do, that it may set up its own interests in complete freedom from regulation of the price of its wholesale sales would be to permit it, if it were so inclined, to engage in the every exploitation which the Act was designed to prevent. We cannot therefore subscribe to the view that the Act contemplates that petitioner or any other independent producer should be free of price regulation, if it is engaged in the sale in interstate commerce of natural gas for resale.

As to petitioner's claim that its sales are "local" in character, we think it plain that they are sales "in interstate commerce" for the obvious reason that the sale of gas originating in one state and its transmission and delivery to distributors in any other state constitutes interstate commerce. *Federal Power Commission* v. *Natural Gas Pipeline Company of America*, 315 U. S. 575, 582. *Cf. Federal Power Commission* v. *East Ohio Gas Co.*, 388 U. S. 464, 467. The fact that the sales are made at the wellhead is immaterial for the particular point at which the title and custody of the gas pass to the purchaser, without arresting its movement to the ultimate interstate destination, does not affect the essential interstate nature of the business. *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 503-504. Here, petitioner's own brief testifies eloquently to the continuous movement of the gas which it sells at the wellhead. Petitioner admits, as, of course, it must, "that there is a continuous flow of gas from the Deep South wells into the gathering system of Texas Gas; that the mass of gas of which the Deep South gas becomes a part moves continuously through the gathering system into a processing plant; that the movement through the processing plant is continuous; that there is a continuous movement of natural gas from the outlet of the processing plant to both interstate and intrastate destinations. . . ."

Accordingly, and in the light of all of the uncontroverted facts, we hold that when the gas was sold by petitioner it had commenced its journey in interstate commerce.

We are likewise no more impressed than was the Commission with the claim that petitioner's sales were made for "manufacture", not for "resale." This contention is made notwithstanding the fact that all of the parties to the contract between Deep South and Texas Gas fully understood that the gas was to be resold in wholesale quantities by the buyer. In the conduct of its business, petitioner sells its gas in bulk to Texas Gas. Texas Gas in turn and at the tailgate of its processing plant resells the gas which it purchases from petitioner to an interstate transmission company for resale, as well as to intrastate customers. The inescapable fact here then is that at least some portion of the gas sold by petitioner is resold to consumers outside the State of Texas. Consequently, there can be no question that petitioner is making sales for resale within the meaning of the Act. Nor is it of significance that the gas in the course of its interstate transmission passes through Texas Gas' processing plant. The processing herein involved is not an interruption of the interstate journey and is not "manufacture." On the contrary, as noted above, the processing does not interrupt the continuous movement of the gas from the wellhead to consumer burner tips and is merely a part of the business of transporting and marketing gas in interstate commerce. *City of Detroit* v. *Federal Power Commission*, D. C. Cir., 230 F. 2d 810, 820, cert. denied 352 U. S. 829. *Cf. Cities Service Gas Co.* v. *Federal Power Commission*, 10 Cir., 155 F. 2d 694, cert. denied 329 U. S. 773.

Petitioner also insists that the casinghead gas which its sells is not "natural gas" within the meaning of the Act. For answer we deem it sufficient to say that there is nothing in the general language used in the definition of "natural gas," quoted above, which suggests that a special or narrow or unnatural definition of "natural" was meant. Boone's Petroleum Dictionary (1952) defines

natural gas as *a mixture of gaseous hydrocarbons found in nature* in many places connected with deposits of petroleum, to which the gaseous compounds are closely related. The record in this case shows that the principal constituents of natural gas which is used as a domestic or industrial fuel are methane and ethane; that casinghead gas contains methane and ethane, as well as other constitutents that are valuable, such as propane, butane, and the heavier components that comprise natural gasoline; and that it is economically desirable to remove these additional components for their value. The gas sold by petitioner contains the methane and ethane which constitutes the bulk of fuel gas distributed to domestic, commercial and industrial consumers. And the extraction process to which the gas is subjected after delivery under the sales contract does not create or add to the product any amount of either of those components. Thus, it is plain that casinghead gas is not any the less "natural" gas because it contains variable amounts of other constituents.

The petitioner alternatively contends, however, that regardless of whether the sales in question are sales in interstate commerce, the transactions fall within the clause of Section 1(b) of the Act which specifically excepts from the Commission's jurisdiction the regulation of ". . . . the production or gathering of natural gas." We do not at all agree, but on the contrary think that our observations in *Interstate Natural Gas Company* v. *Federal Power Commission*, 156 F. 2d 949, 951, supply a ready answer to this contention. There, in speaking of Section 1(b), we said:

> "[The Act] is very simply and plainly written. After stating what it shall apply to, it then states what it shall not apply to. Under familiar rules of construction a negation in or exception to a statute will be construed so as to avoid nullifying or restricting its apparent principal purpose and the positive provisions made to carry them out. . . . Here the statute was drawn to regulate, it picked out for inclusion

'sale in interstate commerce of natural gas for resale for ultimate public consumption.' . . . Unnecessarily perhaps but in the interest of making clear that the act gave jurisdiction only over sales and transportation of the kind described in it, it used language removing from any doubt that the Commission was not to have jurisdiction over properties used for production and local distribution or the activities of production and gathering. It did this by expressly providing that the act should not apply 'to the facilities used for such [i.e. local] distribution or to the production or gathering of Natural gas.' ''

The exemption of production and gathering merely means that the physical activities, facilities and properties used by petitioner in the production and gathering of natural gas are not within the commission's power of regulation. However, there is nothing in the Act which suggests, either expressly or by implication, that by the exemption of production and gathering, Congress intended that the wholesale sales of natural gas in interstate commerce which are consummated before the gas has been gathered or processed should not be regarded as sales in such commerce over which the Commission was granted exclusive jurisdiction to regulate.

Petitioner argues, however, that what is involved here is "more than merely regulation of sales," for the reason that our decision herein will give rise to certain hypothetical situations predicated upon assumed future actions by the Commission, viz., that should certificates of public convenience and necessity which petitioner will apply for be refused, Deep South must close its wells and suspend operations, and that petitioner must obtain the Commission's permission before discontinuing sales from a well which has been found subject to Federal jurisdiction. No such issues are presented in the instant case, and it will be time enough to pass upon those isues if and when they are properly presented.

In the light of the foregoing it follows that the order of the Commission declaring Deep South Oil Company of

Texas to be a "natural-gas company" within the meaning of the Natural Gas Act should be and the same hereby is affirmed.

AFFIRMED.

BROWN, Circuit Judge: I dissent for reasons hereafter to be filed.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15900

SHELL OIL COMPANY,

Petitioner,

VERSUS

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION, SITTING AT WASHINGTON, D. C.

(June 29, 1957.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BORAH, Circuit Judge: This is a companion case to *Deep South Oil Company of Texas* v. *Federal Power Commission*, No. 15,849, this day decided, in that Shell Oil Company, pursuant to Section 19(b) of the Natural Gas Act, is seeking review of the order of the Federal Power Com-

mission which is the subject also of review in the *Deep South* case.

While the facts in the instant case are similar to those presented in *Deep South*, they are not identical thereto, and for present purposes they may be summarized as follows: Petitioner herein, Shell Oil Company, is engaged in the business of exploring for, producing, refining and marketing petroleum and petroleum products, and with respect to its Texas operations, it produces and sells "casinghead gas" at or near the wellhead from nineteen oil wells in the McElroy Field and eight oil wells in the Nome Field. It also sells "gas well gas" from one well in the latter field.

The casinghead gas which is produced in the McElroy Field is sold to Phillips Petroleum Company pursuant to a contract entered into between Phillips and petitioner's assignor on May 7, 1936. The contract provides, among other things, that Phillips shall pay to the seller fifty percent of the net proceeds received from any sale of the gas which it sells from the gasoline plant. Prior to delivery under the contract the gas from each of the nineteen wells located in this field passes through the wellhead and into a flow line which is connected with a single central field separator (located on Shell's lease) where the gas is separated from crude oil and free water. Within a few feet from the point at which the gas leaves this separator it is metered and delivered and title thereto passes to Phillips. As in *Deep South*, the gas sold by petitioner is commingled in the purchaser's field pipelines with casinghead gas from a number of other wells in the field and the commingled mass of gas thereafter enters Phillips' Crane gasoline plant where it is scrubbed, compressed, and run through absorption towers for the removal of liquefield hydrocarbons. The greater part of the gas is thereafter sold by Phillips at the tailgate of the Crane plant to El Paso Natural Gas Company. Inasmuch as this gas contains too high a percentage of hydrogen sulphide and carbon dioxide for use as a domestic burner tip fuel, El Paso further treats the gas which it purchases to

remove these incombustible diluents, dehydrates the gas, and then turns it into one of its transmission lines for transportation in other States.

All of Shell's gas, both casinghead and gas well gas, which is produced in the Nome Field is sold to Texas Gas Pipeline Corporation, a subsidiary of Texas Gas Corporation, pursuant to a contract entered into on October 15, 1954. As in the contract between Deep South and Texas Gas, the contract for the sale of Shell's gas from the Nome Field similarly commits to the performance thereof all of the gas to be produced from Shell's leases in that field and provides that the gas is to be delivered in a full stream without the extraction of gasoline or other hydrocarbons. Likewise, as in the case of Deep South, the purchaser receives delivery of the casinghead gas at the outlet valve of field separators and the gas well as is delivered at the wellhead. After taking title and delivery at these points, the purchaser then commingles the gas in its field pipelines with gas purchased from many other sources and transports the commingled mass to the Winnie processing plant which is owned and operated by its parent corporation. At the Winnie plant the gas is processed for the removal of water vapor and liquefiable hydrocarbons and thereafter Texas Gas Pipeline Corporation receives for interstate shipment a portion of the processed gas.

As we noted in the *Deep South* opinion, the proceedings in this cause as well as in Cases Nos. 15,849 and 15,884, were consolidated before the Commission for hearing and in both the presiding examiner's decision and the Commission's Opinion No. 284, it was determined that all sales of natural gas by Deep South, Shell, and Humble Oil, there under consideration, were sales of natural gas in interstate commerce for resale within the meaning of the Natural Gas Act and that each of the petitioners was a "natural-gas company" subject to the Commission's jurisdiction.

In this review proceeding, the basic contentions and the grounds asserted for setting aside the Commission's order

are in essence identical to those urged by petitioner in the *Deep South* case, *supra*, and what we have said in that case is dispositive of those issues. However, and in view of petitioner's vigorous assertion that its sales to Phillips of casinghead gas which must be processed by both its purchaser and the subsequent buyer, El Paso, are not for "resale" but for "manufacture," we shall set forth in this opinion our reasons for rejecting this argument.

Petitioner relies strongly on the "purpose" clause of its contract with Phillips which provides that the casinghead gas sold thereunder is conveyed to the buyer for the purpose of manufacturing gasoline or such other products as may be manufactured at the Crane plant. It should not be overlooked, however, that this contract contains no limitation on the authority of Phillips to dispose of the gas in any way it sees fit, and affirmatively provides that the buyer shall have the right to sell any or all surplus gas remaining after the "extraction" of gasoline and also provides for the payment to petitioner of fifty percent of the receipts from such sales. Thus, the true purpose of the contract includes the sale of the gas which remains after processing as well as the sale of extracted products. But be this as it may, the legal determination of the question rests not upon the parties' use of the word "manufacture," but upon the actual disposition of the gas. The record here clearly shows that the gas sold to Phillips is resold by it and that the parties contemplated that the buyer would resell the gas in wholesale quantities is revealed in Section 3.02 of the contract which reads: "Buyer has applied to the Federal Power Commission for a Certificate of Public Convenience and Necessity *in order to establish a market for the gas committed hereto and to perform its obligations to seller under this contract. . . .*" (Emphasis supplied.) Thus, as in *Deep South*, there can be no question that petitioner is making sales in interstate commerce of natural gas for resale within the meaning of the Act.

Accordingly, the order of the Commission must be and the same hereby is affirmed.

AFFIRMED.

BROWN, Circuit Judge: I dissent for reasons hereafter to be filed.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15849

DEEP SOUTH OIL COMPANY OF TEXAS,
Petitioner,

VERSUS

FEDERAL POWER COMMISSION,
Respondent.

No. 15900

SHELL OIL COMPANY,
Petitioner,

VERSUS

FEDERAL POWER COMMISSION,
Respondent.

No. 15884

HUMBLE OIL & REFINING COMPANY,
Petitioner,

VERSUS

FEDERAL POWER COMMISSION,
Respondent.

No. 16130

CONTINENTAL OIL COMPANY,
Petitioner,

VERSUS

FEDERAL POWER COMMISSION,
Respondent.

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION, SITTING AT WASHINGTON, D. C.

(July 30, 1957.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BROWN, Circuit Judge, dissenting: Again, my differences, while substantial are basic and, in this approach, as before, *Magnolia Petroleum Co.* v. *Federal Power Commission*, 5 Cir., 236 F. 2d 785 at 793 to 811, I accept the Court's fair and faithful outline of the cases. Since these cases [1] present the common problem of jurisdiction of the Federal Power Commission over the first sale by an oil-gas-well producer made before production or gathering has ended, I treat them together despite minor variations in factual details.

Likewise, it both simplifies and emphasizes the nature of this problem to concentrate primarily upon the most common transaction [2]—the sale of casinghead gas to a processor who in turn sells residue gas to an interstate pipe line.

In this way we come to see what might otherwise be obscured. The problem really is: What did Congress in 1938 mean by the language of Section 1(b).[3] I purpose,

---

[1] In 16,130, *Continental Oil Company* v. *Federal Power Commission*, 5 Cir. ..... F. 2d ..... [June 29, 1957], procedural problems arise and are discussed. I am in agreement with the Court's disposition of these, and my differences as to that case relate solely to the basic issue.

[2] Deep South to Texas Gas to Texas Eastern.
Shell to Texas Gas Pipeline to Transcontinental.
Shell to Phillips to El Paso Natural Gas.
Humble to Processors to Pipe Line Companies.

[3] § 1(b), 15 USCA 717(b):

"The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in

fully emphasize 1938. For the circumstances of the passage of the Natural Gas Act were so unique that, we are told, "• • • *prior* constitutional decisions, not what we have since decided or would decide today, form the measure of the gap which Congress intended to close by this Act. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 508, 86 L. Ed. 471, 377 • • •; and see *Parker* v. *Motor Boat Sales*, 314 U. S. 244, 250, 86 L. Ed. 184, 191 • • •," *Federal Power Commission* v. *East Ohio Gas Company*, 388 U. S. 464, 472, 94 L. Ed. 268, 277.

This refers, of course, to the oft repeated history that Congress legislated to fill the gap created by specific decisions[1] of the Supreme Court. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, 517-519, 92 L. Ed. 128, 137-139.

This has at least a dual significance. First, it makes terribly important just what those cases decided, because it was the decisions which created the gap. And second, as 1938 Congressional preoccupation with the gap is the test, the jurisdictional parts of the Act must be viewed through 1938 lenses. With that outlook, can it be said that Congress knowingly set in train the consequences which flow from these decisions?

The first becomes of some importance in the Court's view because, in the final analysis, the conclusion reached

---

interstate commerce of natural gas for resale for ultimate public consumption • • • and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas • • • or to the production or gathering of natural gas • • •."

[1] *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 310, 68 L. Ed. 1027, 1031; *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, 89, 71 L. Ed., 549, 553; and see *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23, 64, L. Ed. 434, subsequently repudiated *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 73 L. Ed. 1171.

in *Deep South* rests upon a Committee report [5] and the decision of *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, 98 L. Ed. 1035. The fact is, of course, that neither of the two cases, note 4, *supra*, dealt even remotely with the sale by a producer in an oil field to a processor who in turn sold to an interstate pipe line. In *Attleboro* the utility generated and transported electricity; in *Kansas* the seller to the local distributing company was an integrated producer-transmission pipe line company. So far as *Phillips Petroleum Company* v. *Wisconsin*, *supra*, which I accept, is concerned, I hardly think that, with the Court's studied traditional refusal to deliver advisory opinions even on matters which it knows are then somewhere in the judicial mill and which will inevitably come through its own grist, the Supreme Court meant to decide that *all* sales of gas which, because of molecular identity, flow ultimately from Texas or Louisiana to New York are sales in interstate commerce.

This is but another way of saying that we face an entirely new case—one never before decided. The crucial issue here is whether the sales are in interstate commerce as meant by § 1(b). At the outset in *Phillips* that issue was conceded as "Petitioners admit that Phillips engages in 'the sale in interstate commerce of natural gas for resale,' as, of course, they must. *Interstate Natural Gas Co.* v. *Federal Power Com.*, 331 U. S. 682, 687-689, 91 L. Ed. 1742, 1746-1748," 347 U. S. 672 at 677, 98 L. Ed. 1035 at 1045. The second issue involved here is whether these sales are made in the course of production or gathering. The similar contention in *Phillips* fell by the Court's re-

---

[5] The *Deep South* opinion states: "The Committee reports on the bill which became the Natural Gas Act specifically stated that 'sales for resale, or so-called wholesale sales in interstate commerce (for example, sales by producing companies to distributing companies) * * * have been considered [by the courts] to be not local in character, and even in the absence of Congressional action not subject to State regulation.'" H. R. Rep. No. 709, 75th Cong., 1st Sess. 1-2; Senate Rep. No. 1162, 75th Cong., 1st Sess. 1-2.

jecting the Commission's finding and the plain holding that "We are of the opinion * * * that the finding is without adequate basis in law, and that production and gathering, in the sense that those terms are used in § 1(b), end before the sales by Phillips occur," 347 U. S. 672, 678, 98 L. Ed. 1035, 1045. And certainly *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U. S. 682, 91 L. Ed. 1742, so heavily relied on in *Phillips* cannot have remotely decided our case. To Interstate's contention "that the sales to the three pipe line companies are a part of the gathering process and consequently not within the Commission's power of regulation," the court answered positively "By the time the sales are consumated, nothing further in the gathering process remains to be done," 331 U. S. 682 at 692, 91 L. Ed. 1742 at 1749. This case recognizes also that principles of constitutional law and statutory construction are not equated with laws of physics, so that the inquiry is something more than the schoolboy's quest for molecular identification. Concerning the Congressional purpose to leave production and gathering to the States, the Court stated:

> "It was the intention of Congress to give the States full freedom in these matters. Thus, where sales, though technically consumated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory function, the jurisdiction of the Federal Power Commission does not attach * * *," 331 U. S. 682 at 690, 91 L. Ed. 1742 at 1748.

So nothing written so far tells us authoritatively what Congress in 1938 meant to do about sales made prior to completion of production and gathering. Did Congress intend to place this under the control of a remote Federal bureau?

I think the consequences of any such holding are so far-flung and so disturbing to the delicate balance in our system of dual sovereignty that, divining the legislative will as is the judicial function, *United States* v. *American Trucking Associations*, 310 U. S. 534, 543, 84 L. Ed. 1345, 1350, and whether we look at this through 1938 lenses or 1957 bifocals, I cannot believe that Congress in this innocuous way thought that it was remaking the concept of our political economy.

Since it is the fact of *movement*[6]—continuous and almost irrepressible movement—from the time the gas molecule first begins to stir and is once released from the bowels of the earth until consumed at the Brooklyn burner tip—that is the characteristic which to the Court makes this inevitably interstate, the impact has been dramatically described, *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259-260, 67 L. Ed. 237, 243:

> "The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty, of exportation of a product or article from a state, determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production; and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries; it would nationalize and withdraw from state jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other states at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are, in varying

[6] The Court's decision of "sale in interstate commerce" is a bootstrap conclusion: it is an interstate sale because of the movement and yet the movement occurs only because of the sale.

> percentages, destined for and surely to be exported to states other than those of their production."

Such a holding withdraws from the states a traditional field for effective regulation of an economic activity of major importance to the general welfare of the state. Specifically, such a holding will forbid state regulation of oil and gas production activities insofar as that state policy is aimed at, or works through, the use of minimum prices.

This is no theoretical academic possibility. This is an actual fact of a present doctrine whose applicability is limited only by the ultimate judicial declaration of the earth-ward limits of a jurisdictional sale. As a part of the yet unascertained fallout of the atomic *Phillips* decision, the Court in *Natural Gas Pipeline Company of America* v. *Panoma Corporation* and *Natural Gas Pipeline Company of America* v. *Corporation Commission of the State of Oklahoma,* 349 U. S. 44, L. Ed. 866, held that as to sales within the jurisdictional limits of *Phillips*, the State of Oklahoma was forbidden to apply its otherwise constitutional[7] power to prescribe n .num prices for Oklahoma gas sold or delivered. The Court with brief but awesome finality said:

> "In these cases Oklahoma has attempted to fix a minimum price to be paid for natural gas, after its production and gathering has ended, by a company which transports the gas for resale in interstate commerce. We held in Phillips Petroleum Company v. Wisconsin, 347 U. S. 672, 98 L. Ed. 1035 * * * that

[7] Apart from the effect of the Natural Gas Act, the predecessor of this very same state order (identical except as to the price) was upheld in *Cities Service Gas Company* v. *Peerless Oil & Gas Company*, 340 U. S. 179, 95 L. Ed. 190, and *Phillips Petroleum Company* v. *State of Oklahoma*, 340 U. S. 190, 95 L. Ed. 204. As to these, the Court in Panoma said, "In those cases we were dealing with constitutional questions and not the construction of the Natural Gas Act * * *," 349 U. S. 44 at 45, 99 L. Ed. 866 at 867.

such a sale and transportation cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission. The Phillips case, therefore, controls this one." 349 U. S. 44 at 44-45, 99 L. Ed. 866 at 867.

For these purposes it is of slight comfort to these states that, as *Panoma* plainly said, this was applied to a post-production and gathering sale. For the basis for the decision was the jurisdictional application of the Act. With the inexorable physical characteristic that traces molecules from Permian Basin to Queenstown Heights and joins body, fleece and tail to Mary's ubiquitous fabled lamb, wherever goes F. P. C. jurisdiction, so goes *Panoma*. There it was *after* gathering. Here it is at the wellhead before gathering is completed. The majority's decision takes us that far. Where can the states go? To the well-side of the Christmas tree? To the bottom of the well?

Wherever it is fixed is not far enough, nor may it ever be. For the thesis of the majority's opinion is to mix Boyles and *Phillips* law to come up with the startling legal-statutory interpretation law that because gas, once released is in a constant state of movement, that *movement*, from the very moment it first started, is characterized (intra or interstate) by its final destination. This means that if Oklahoma prescribes the price, as has Kansas,[8] as a condition precedent to the right of *withdrawal* of this valuable domestic resource, the sale of that gas *out* of the well—by which alone would there ever

---

[8] Now pending before the Supreme Court with probable jurisdiction noted, 25 Law Week 3351, as No. 797, is the action of the Supreme Court of Kansas, *Cities Service Gas Company* v. *State Corporation Commission of Kansas*, 180 Kan. 454, 304 Pac. 2d 528, sustaining the action of the state regulatory agency in fixing the wellhead price for withdrawal of gas. Also pending are similar Oklahoma minimum price cases, see *Phillips Petroleum Company* v. *Oklahoma Corporation Commission*, Nos. 953-955, 25 L. W. 3346; *Michigan Wisconsin Pipe Line Company* v. *Corporation Commission of State of Oklahoma*, No. 809, 25 Law Week 3271.

be production at all—was of necessity *in interstate commerce,* and such sale and the movement of the gas occasioned by it would fall under *Panoma.*

Of course, I am not saying that this consequence makes the law invalid or unwise. I assume that Congress could within the broad compass of its constitutional powers over commerce do this very thing. But the fact, so often repeated is that "the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limits of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies. Accordingly, Congress in § 1(b) of the Act not only prescribed the intended reach of the Commission's power, but also specified the areas into which this power was not to extend," *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498 at 502-503, 93 L. Ed. 1449 at 1504.

Avowedly using only a portion of its power, is it likely then that Congress meant to go this far? To think so is to attribute to them a collective ignorance of an already well-defined traditional policy in the states to regulate,[9] by regulating the price at which oil or gas could be sold, this important business. Indeed, so well recognized was such state policy that, in the setting of those days, it led to the passage of the Connally Hot Oil Act,[10] 15 USCA

---

[9] As shown by both pre and post-1938 decisions, these state efforts had met with Federal constitutional approval: *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, 76 L. Ed. 1062 (1932); *Railroad Commission* v. *Rowan & Nichols Oil Co.,* 310 U. S. 573, 84 L. Ed. 1368 (1940); and see, *Nebbia* v. *New York,* 291 U. S. 502, 78 L. Ed. 940 (1934).

[10] The Act had its origin in the Executive Orders promulgated July 11, 1933 and July 14, 1933, under the National Industrial

715 *et seq.* This Act gears interstate transportation of oil to state regulation. And at least everyone on the outside of a courtroom knows that modern oil-gas conservation programs, preventing waste by limiting production to meet an established market demand,[11] whether they do so directly or indirectly, actually fix prices. And there need be no apology for this. For the welfare of a state whose economy rests substantially on oil and gas has a vital interest in local legislative or governmental means of stabilizing such a business. "That a legitimate local interest is at stake * * * is clear. A state is justifiably concerned with preventing rapid and uneconomic dissipation of one of its chief natural resources," *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179 at 187, 95 L. Ed. 190 at 202.

Ten cent oil in the early thirties produced, in East Texas as elsewhere, calamity.[12] With this history so fresh in its recollection, indeed, with like contemporary prob-

---

Recovery Act. 48 Stat. 200, chap. 90, 15 USCA 710(a), and stricken down in the celebrated case of *Panama Refining Company* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446; see *United States* v. *Gilliland*, 312 U. S. 86, 94, 85 L. Ed. 598, 604. "The purpose of the Connally Act * * * is to aid the states in enforcing laws limiting the amount of oil permitted to be produced from wells in designated fields, by prohibiting shipment of excess oil produced * * * in interstate commerce * * *." *The President of the United States* v. *Skeen*, 5 Cir., 118 F. 2d 58, 59.

[11] That this takes collective action of the interested oil-gas producing states is reflected by Congressional approval of the creation and activities of the Interstate Oil and Gas Compact, see Interstate Compact to Conserve Oil and Gas, Aug. 27, 1935, c. 781, 49 Stat. 939, Extensions Aug. 10, 1937, c. 572, 50 Stat. 617; July 20, 1939, c. 337, 53 Stat. 1071; August 21, 1941, c. 400, 55 Stat. 666; July 7, 1943, c. 494, 57 Stat. 383; Interstate Oil and Gas Compact Joint Resolution, Aug. 28, 1951, c. 350, 65 Stat. 199.

[12] It led to what the Governor of Texas considered insurrection requiring declaration of martial law as recently enacted conservation laws were enjoined by Federal Courts. *Sterling* v. *Constantin*, 287 U. S. 378, 77 L. Ed. 375.

lems so much then a matter for its current consideration, it is beyond my belief to think that Congress thought that, by the inocuous language of § 1(b), it was letting loose a nascent force which either could, or would, or might completely alter a major business or thwart a major field of state regulation.

Chief Justice Vinson, recognizing in *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U. S. 682 at 690, 91 L. Ed. 1742, 1748, *supra*, that some sales "technically consumated in interstate commerce * * * are so closely connected with * * * local incidents * * * as to render rate regulation by the Federal Commission inconsistent or a substantial interference with the exercise by the State of its regulatory function, [and] the jurisdiction of the Federal Power Commission does not attach," showed great prescience.

Especially so, if, for example, the current holding and contention of the Federal Power Commission is followed [13] that the price for which independent producers may sell their gas to a pipe line is controlled by *City of Detroit* v. *Federal Power Commission*, D. C. Cir., 230 F 2d 810, cert. den. 352 U. S 829, 1 L. Ed. 2d 48. That case, with its emphasis on cost data as a part of a so-called rate base, points out that if a "fair-field" price is to be justified, it can be so only when it does not produce more than reasonably necessary to permit continued exploration for and development of gas reserves. That, in the light of the oft-repeated statement that "Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act," *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, 685, 98 L. Ed. 1035 at 1049, may mean that it is the positive duty of the Federal Power Commission aggressively to remand and then approve only the *lowest* rate. But the rate which is most favorable to consumers in Brooklyn, *ie.*, the *lowest* pos-

[13] We now have nine such cases pending on petition for review from the Federal Power Commission.

sible one, may run counter to, and could frustrate altogether, the domestic policy of Oklahoma,[14] or Kansas, or Texas, or New Mexico.

Again, I repeat, Congress could surely make the one subject to the other. But the question remains: where do we find a declaration of any such far-reaching purpose?

The holding of a jurisdictional sale at the wellhead does more than prohibit, and thus invade, state regulation. It affirmatively imposed substantial obligations of the most awesome kind which, although appropriate to utility regulation and within the conceded constitutional power of Congress, could hardly have been anticipated by Congress for application to a person engaged in the local activity of drilling and bringing in an oil or gas well. Here, we see that we cannot brush this aside, as does the majority as mere pessimistic hypothetical prophesies.[15] Holding,

---

[14] In *Cities Service Gas Co.* v. *Peerless, supra,* at 340 U. S. 183, 95 L. Ed. 200, the Court pointed out that the Oklahoma "• • • Commission concluded that there was no competitive market for gas in the Guymon-Hugoton Field, that the integrated well and pipe-line owners were able to dictate the prices paid to producers without pipe-line outlets, and that as a result gas was being taken from the field at a price below its economic value. It further concluded that the taking of gas at the prevailing prices resulted in both economic and physical waste of gas • • •."

If long-line transmission pipe-lines by mere location and availability have that monopolistic power to drive down prices, what will their power be when, acquiring as a new and somewhat unusual ally, the Federal Power Commission, the two move jointly together to drive prices down further in the name of consumer public interest? What does Oklahoma do in the meantime? What happens to its landowner royalty owners, its oil companies, its banks, its public treasury?

[15] In *Deep South*, the Court says: "Petitioner argues, however, that what is involved here is 'more than merely regulation of sales,' for the reason that our decision herein will give rise to certain hypothetical situations predicated upon assumed future actions by the Commission, *viz.*, that should certificates of public convenience and necessity which petitioner will apply for be refused, Deep South must close its wells and suspend operations, and

itself sets in train a whole series of requirements which makes it plain that when the wildcatter spuded in, he may have thought himself a free enterpriser in the American tradition, but when the well comes in and the gas is sold to a person who sells it to another who sells it to a pipe line who transports it to a distributing company who sells it to a homeowner, he has become a public utility.

For the Court to say "no such issues are presented in the instant case, and it will be time enough to pass upon those issues if and when they are properly presented" is to forget so soon what we struggled with a year ago in *Magnolia Petroleum Company* v. *Federal Power Commission*, 5 Cir., 236 F. 2d 785, cert. den. 352 U. S. 968, 1 L. Ed. 2d 322, and the related cases where the series 174, 174A, 174B Order [16] cases were under review Not here concerned with the validity of those regulations and accepting them for what they state, these regulations with their injunctive and criminal sanctions under Sections 20, 21(a), 15 USCA § 717s, § 717t(a), compel definitive action. They compel it now. Noncompliance subjects the independent producer to penalties now. Under Section 157.23(a) the Order requires an application for certificate of public convenience and necessity and, once obtained with service performed, Section 157.28 forbids abandonment of any sale or service without the express permission and approval of the Commission, *J M. Huber Corporation* v *Federal Power Commission*, 3 Cir., 236 F. 2d 550, cert. den. 352 U. S 971, 1 L. Ed 2d 324

---

that petitioner must obtain the Commission's permission before discontinuing sales from a well which has been found subject to Federal jurisdiction. No such issues are presented in the instant case, and it will be time enough to pass upon those issues if and when they are properly presented."

[16] See my dissent, *Magnolia Petroleum Company* v. *Federal Power Commission*, 236 F. 2d 785 at 793, especially Part 1, page 797 through 808, which sets forth these regulations and describes their operation in detail.

For an industry which has been built upon the inveterate, irrepressible, sometimes flamboyant, optimism of people anxious to take great risks to reap great rewards, suddenly to make out of it the staid and conservative business of a public utility, represents such a radical abandonment of the past that I cannot believe that Congress meant to do this to the thousands who annually bring, or try to bring, or hope to bring, in gas and oil wells. Especially is this so since the making of the very first sale which allows a molecule to make an interstate journey subjects that operator permanently to the jurisdiction of a remote agency until he can prove himself entitled to be freed. Even more so since those very same Orders prescribe that he cannot make any changes in the price which he is willing to sell his gas without first filing, as required under Section 154.92(a), a rate schedule and proving his right to it. And that very same Order, Section 154.94, as does the consistent administrative practice of the Commission, forbids either the use or application of automatic contract step-up rate escalation clauses. The operation of those Orders in the context of the Act under Sections 4 and 5, 15 USCA 717c, 717d, exposes the operator to the possibility of an irretrievable loss by suspension for the maximum period of five months, *Humble Oil & Refining Company* v. *Federal Power Commission*, 5 Cir., 244 F. 2d 315 [7 cases]; *Sun Oil Company* v. *Federal Power Commission*, 5 Cir., 244 F. 2d 77. They subject the operator to the burden of proving as just and reasonable any proposed increase And they expose him all the time to the likelihood that under Section 5 the Commission may determine that what he and his purchaser have agreed to, either in initial rates or those subsequently filed and approved, now produces an unjust and unreasonable rate which can no longer be collected.

I would think that when the Congress sets out radically

to change a local free enterprise business [17] to that of a regulated utility, it would do so in unmistakable terms. I would think that it would not only say so, but prescribe as well adequate machinery [18] for the fulfillment of such

---

[17] As of December 31, 1954, there were 511,200 producing wells. During 1954, in addition to 29,773 oil wells and 19,169 dry holes, 3,977 gas wells were brought in. Statistical Abstract of the United States 1956, page 741.

[18] To those of us dealing with these cases since the *Phillips* decision, the effort of the Commission and its overburdened staff to assimilate and handle the thousands of applications for certificates of public convenience and necessity, for rate increases, etc., can evoke only the most sympathetic appreciation for a problem for which it was not equipped by Congress. In October 1954 there were some 2,100 rate filings with 9,702 being received in January 1955.

Of more fundamental significance than the Congressional omission of the working tools (an adequate staff and budget) is the complete failure to prescribe the tools of substance, *i.e.*, the standards to be applied for utility rate making in this field. The Commission immediately recognized this by its Order instituting Docket R-142 under the revealing Heading of "Consideration of principles and Methods to be Applied in the Fixing of Rates to be Charged by Independent Producers for Natural Gas Sold in Interstate Commerce for Resale" which stated:

> "2. Necessary to a determination of the rates permitted by the Natural Gas Act to be made, demanded or received by a natural-gas company is the choice of methods to be used in determining the just and reasonable rate for any particular sale. The Commission, recognizing the basic differences between the operations of a producer and those of a pipe-line company, is desirous of securing any information, suggestions or proposals bearing upon the possible effect the several approaches might have upon the public interests towards which the Natural Gas Act is directed.
>
> "3. The Commission, therefore, is inviting the submission of suggestions as to the principles and methods to be applied by it in its regulation of the rates to be charged by independent producers for the transportation or sale of natural gas subject to the jurisdiction of the Commission. * * *
>
> "4. This is a matter of national importance and the Com-

an undertaking, I would have thought that such a spectacular purpose would be soon evident and would not take eighteen years to discern.

In this analysis I have concentrated upon the searching out of Congressional intent. In that process, I think the so-called specific exemption of production and gathering is to be read as a part of § 1(b) and not treated as though it stood alone. In that process, also, there are other aids advanced by the parties which point significantly in this direction.

At the outset it is significant that this is an "*in* interstate" commerce Act not one "*affecting*"[19] interstate

---

mission invites members of the industry, producers, gatherers, interstate pipe-line companies, distributors, consumers, groups and associations representative thereof, State commissions, municipalities, and any other interested persons to submit information, data, views, comments or suggestions in writing concerning the problem. • • •"

But the hearing could hardly supply what the statute omitted, so it was not surprising that after hearings in R-142 scheduled in December 1954 and held at various times in 1955, the Commission by order December 1, 1955, terminated R-142 with this significant finding:

"• • • the information gained in this proceeding, convinces us that, on the basis of the record herein, we should not lay down any rules as to what would be necessary or appropriate for consideration in determining the just and reasonable rates of any independent producer subject to our jurisdictio under the Natural Gas Act.

"Accordingly, after full consideration of the suggestions, comments, and recommendations submitted, it appears to the Commission that adoption of any standards, principles, or methods respecting the matters and issues involved herein is not appropriate or necessary in carrying out the provisions of the Natural Gas Act. We so find."

[19] *Cf.* for example other regulatory statutes passed prior to or contemporaneously with the Natural Gas Act: The Fair Labor Standards Act of 1938 (Act of June 25, 1938, 52 Stat. 1060, 29 USCA 201, 206), extended Federal regulation to conditions of

commerce. The test then is not how much Congress covered, but rather how much of a field which it deliberately limited did it intend to cover. *Federal Trade Commission* v. *Bunte Bros. Inc.*, 312 U. S. 349, 85 L. Ed. 881 The legislative history[20] indicates that the "in interstate"

---

employment "in the production of goods for commerce. The Bituminous Coal Act of 1937 (Act of April 26, 1937, 50 Stat. 72) applied Federal authority to matters directly "affecting" interstate commerce. The National Labor Relations Act (Act of July 5, 1935, 49 Stat. 49, 29 USCA 141), imposed regulation upon matters "affecting" interstate commerce.

[20] One of Petitioner's briefs concisely traces this history:

As originally introduced, the bill which became the Natural Gas Act defined the scope of the Commission's jurisdiction in these words [H. R. 4008, 75th Cong., 1st sess. (1937)]:

> "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale of *such* natural gas for resale to the public, and to natural-gas companies engaged in such transportation or sale • • •" (emphasis supplied).

Similarly, § 2(5) of the original version of the bill contained this definition of "natural-gas company":

> " 'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale of *such* gas for resale to the public" (emphasis supplied).

During hearings, objection was raised to the failure of the bill to "confine jurisdiction to gas sold in interstate commerce." [Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 4008, 75th Cong., 1st sess., pp. 103-105 (1937)] The objecting witness, Mr. Russell G. Hunt, then offered the following amendment to § 2(5):

> " 'Natural-gas company' means a person engaged in • • • the sale in interstate commerce of such gas for resale to the public."

Without material change, this amended definition, together with a corresponding change in § 1(b), appeared in the bill as favorably reported out by the House Comittee, [H. R. 6586 (1937) and H. Rept. No. 709, 75th Cong., 1st sess. (1937)] and in the same form in the Act as passed.

See also *Federal Power Commission* v. *Panhandle Eastern Pipe Line Copany*, 337 U. S. 498, 512, 513, footnote 16, 93 L. Ed. 1499 at 1509.

commerce standard was articulately adopted to determine what "sales" were covered.

And since "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of busines," *Swift & Company* v. *United States*, 196 U. S. 375, 398, 49 L. Ed. 518, 525, and "We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical consideration," *United States* v. *Yellow Cab Company*, 332 U. S. 218, 231, 91 L. Ed. 2010, 2020, the test cannot be the simple one of the physical property of gas which keeps it in constant movement from the bottom of the well to the burner tip. " 'Practical continuity' does not always make an act a part of interstate commerce," *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 at 177, 83 L. Ed. 586 at 593. This is so since with casinghead gas the sales precede local processing which is essential to extract the valuable economic components of it and to prepare the gas for its interstate transmission and use as fuel The procesing itself is a local or intrastate activity and can hardly be regarded as being "in" interstate commerce.[21] That the commodity almost certainly, or even inevitably, will be shipped out of the state does not make all of the activity interstate commerce even though it is done in the course of a part of that movement.[22]

---

[21] See *Crescent Cotton Oil Company* v. *Mississippi*, 257 U. S. 129, 66 L. Ed. 166; *Parker* v. *Brown*, 317 U. S. 341, 360-361, 87 L. Ed. 315, 331; *Federal Compress & Warehouse Company* v. *McLean*, 291 U. S. 17, 78 L. Ed. 622; *Chassaniol* v. *Greenwood*, 291 U. S. 584, 78 L. Ed. 1004.

[22] See *Coe* v. *Errol*, 116 U. S. 517, 525, 29 L. Ed. 715, 718; *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 74 L. Ed. 504; *Empresa Siderurgica S. A.* v. *County of Merced*, 337 U. S. 154, 157, 93 L. Ed. 1276, 1280; *Department of Treasury of Indiana* v. *Wood Preserving Corporation*, 313 U. S. 62, 85 L. Ed. 1188; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 83 L. Ed. 586; *Atlantic Coast Line Railroad Co.* v. *Standard Oil Company*, 275 U. S. 257, 72 L. Ed. 271; *Oliver Iron Mining Company* v. *Lord*,

In my approach to this matter, I treat these, and the contrary ones urged by the Commission,[23] as aids only. Dealing, as they do, with logs, iron ore, cotton, and the like, they hardly fit the fugitive expansive nature of gas. And, I do not attempt here to assert or explore their final, legal, decisive significance since they may be of "* * * that class of cases [in which] the question is not with respect to the extent of the power of Congress to protect interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with that paramount authority," *Santa Cruz Fruit Packing Company* v. *NLRB*, 303 U. S. 453 at 466, 82 L. Ed. 954 at 960. But I do think they offer some relevant assistance in attempting to assay what Congress, familiar generally with legal concepts applied in this field throughout the years, could have had in mind.

But I do think we must recognize that, as in the situation which I analyzed in detail in which the state is deprived of the right to regulate the price of gas, current authoritative decisions also withdraw a substantial part of the gas business and the gas produced from the area of state taxation permitted in so many of these cases cited in notes 22 and 23, *supra*. In *Michigan-Wisconsin Pipe Line Company* v. *Calvert*, 347 U. S. 157, 98 L. Ed 583, the Court unanimously held that a Texas tax, applicable on gas at the outlet of an independent gasoline plant as it flows into the lines connecting with an interstate transmission system, violates the Commerce Clause. Of course,

---

262 U. S. 172, 67 L. Ed. 929; *Utah Power & Light Company* v. *Pfost*, 286 U. S. 165, 76 L. Ed. 1038; *Arkadelphia Milling Company* v. *St. Louis S. W. R. Co.*, 249 U. S. 134, 63 L. Ed. 517; *Crescent Cotton Oil Company* v. *Mississippi*, 257 U. S. 129, 66 L. Ed. 166; *Hesler* v. *Thomas Colliery Company*, 260 U. S. 245, 259, 260, 67 L. Ed. 237, 243.

[23] See, *e.g.*, *Shafer* v. *Farmers Grain Company*, 268 U. S. 189, 69 L. Ed. 909; *Lemke* v. *Farmers Grain Company*, 258 U. S. 50, 66 L. Ed. 458; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239.

on the principle of *Panoma* to the extent that the jurisdictional sales go to the wellhead or beyond, the movement [24] effected by such sales is in interstate commerce and must likewise be removed from state taxation under *Calvert*. This means that at least to some extent tax cases are pertinent and in any event, this points up another consequence of a startling kind not shown to have been within Congressional contemplation.

These problems like the question of whether casinghead is "natural gas" and whether the sale is for "resale" or for a manufacturing process and later resale cannot be determined by artificial, mechanical standards, dictionary definitions or, equally unauthoritative, judge-made definitions of some physical or scientific phenomenon.

The Act carefully limits it to the sales for resale of natural gas. It is uncontradicted that what is sold is *something* other than the fuel gas which ultimately goes into the transmission lines. Presumably the purchasers buy this casinghead gas for *all* of its constituent elements. Indeed, in the case of Shell, the contract between it and Phillips began in 1938. It was not until July 1950 that any part of the residue gas sold by Phillips to El Paso Natural Gas. Until 1950 the residue gas was continuously flared. What did Phillips buy during these twelve years? What

---

[24] *Calvert* puts it in terms of movement, *i.e.*, transportation

"The problem in this case is not whether the State could tax the actual gathering of all gas whether transmitted in interstate commerce or not, cf. Hope Natural Gas Co. v. Hall, 274 US 284, 71 L ed 1049, 47 S Ct 639, supra, but whether here the State has delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun. * * *" *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 at 166-167, 98 L. Ed. 583 at 592.

If the mechanical-physical movement test is decisive, it is difficult to see why the author and two Associate Justices would soon dissent in *Phillips*.

did Shell sell during these twelve years? What made it change merely because Phillips found a new use or outlet in 1950? Obviously Phillips bought casinghead gas for the valuable liquefiable hydrocarbons (natural gasoline, butane and propane). These are still a major constituent of what they buy. The same is true in the other cases.

If the purchaser buys the gas for its *multiple* use, does not the producer sell for the same purposes. As to casinghead gas, the sale then is for (1) the extraction of valuable liquefiable hydrocarbons, (2) the removal of all valuable hydrocarbons, (3) the processing to eliminate impurities and (4) the sale of the residue to a pipe line company for resale. Now a sale for all four purposes is not a sale for one. And yet the Act itself defines the jurisdictional sale as "a sale in interstate commerce of natural gas for resale for ultimate public consumption" and then categorically states that the Act "shall not apply to *any other* * * * *sale* of natural gas."

Does not the very difficulty of attempting to define each of these operations as "processing" or "manufacturing" or analogize gas to a dead chicken, frozen or otherwise, *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 351 U. S. 49, 52, 54, 100 L. Ed. 917, 922-923, 924, and the uncontradicted fact that the sales had a substantial purpose other than ultimately making fuel gas available for transmission and delivery to consumers, suggest further that sales "in interstate commerce for resale" was meant by Congress to be those effected after such

---

[25] For example, the gasoline plant extracts the butane and propane from the natural casinghead gas. This is reduced to a liquid state under pressure and is distributed, as it now is widely, to communities not served by pipe lines. This very same propane, butane is then resold for "ultimate public consumption for domestic, commercial, industrial * * *" and other uses. Since, on the Commission's and Court's chemical-legal standards, it is still natural gas as the only change is from a gaseous to a liquid state, and there is no change in molecular structure, is the sale by the

processing was completed? Here, as nearly always, the literal [25] test cannot be applied. For "* * * even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words," *United States* v. *American Trucking Associations*, 310 U. S. 534 at 543, 84 L. Ed. 1345 at 1350.

I end as I began: could Congress have intended all of these things? Because I think not, I must respectfully dissent.

---

gasoline plant a sale of "natural gas for resale"? Is the sale by a statewide distributing company to local distributors such a sale? Likewise, suppose Shell sold the *oil* at the wellhead to a purchaser who in turn had sold the casinghead gas to Phillips, who had in turn sold the residue gas to El Paso. Is that original wellhead sale of the oil, carrying inevitably with it the casinghead gas from which all blessings and jurisdiction flow, a sale of natural gas? If not, why not? And if, as the Court holds, the Commission can establish the price which Texas Gas must pay to Deep South where Deep South's volume is but 5% of Texas Gas requirement and its output moved 95% intrastate and 5% interstate, why cannot the Commission fix the price for each barrel of this gas bearing, gas carrying oil?

Opinion and Order Affirming Examiners Decision

UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION

Opinion No. 284

In the Matters of: DEEP SOUTH OIL COMPANY OF TEXAS, HUMBLE OIL & REFINING COMPANY, SHELL OIL COMPANY

Docket No. G-2952
Docket No. G-5261
Docket No. G-4671

Adopted: September 2, 1955.
Issued: September 9, 1955.

Before Commissioners: JEROME K. KUYKENDALL, Chairman; CLAUDE L. DRAPER, SEABORN L. DIGBY, FREDERICK STUECK and WILLIAM R. CONNOLE.

APPEARANCES:

For Deep South Oil Company of Texas: Hugh B. Cox, Esquire, Washington, D. C.; Newell Ellison, Esquire, Washington, D. C.; Harold Willcox, Esquire, Washington, D. C.; Richard L. Fruchterman, Esquire, New York, N. Y.; George Buschmann, Esquire, Washington, D. C.

For Shell Oil Company: Oliver L. Stone, Esquire, New York, N. Y.; R. H. Whilden, Esquire, Houston, Texas; David T. Searls, Esquire, Houston, Texas.

For Kansas Natural Gas, Inc.: Dale E. Doty, Esquire, Washington, D. C.; Norman E. Duke, Esquire, Washington, D. C.; Norman W. Teter, Esquire, Hays, Kansas.

For Humble Oil & Refining Company: Carl Illig, Esquire, Houston, Texas; Rex G. Baker, Esquire,

Houston, Texas; Nelson Jones, Esquire, Houston, Texas; Bernard Foster, Jr., Esquire, Washington, D. C.

For Texas Gas Corporation: William N. Bonner, Jr., General Counsel, Houston, Texas; Richard J. Connor, Esquire, Washington, D. C.; Christopher T. Boland, Esquire, Washington, D. C.; John T. Miller, Jr., Esquire, Washington, D. C.; George J. Meiburger, Esquire, Washington, D. C.

For the Staff of the Federal Power Commission: William J. Grove, Esquire; Pheobe Eppes Gordon, Attorney.

Upon consideration of the entire record in these proceedings, including the testimony and evidence adduced at the hearings which were concluded on January 10, 1955, briefs filed by all the parties and Staff Counsel, the decision of the Presiding Examiner, issued April 5, 1955, exceptions thereto and the oral argument thereon, held on June 13, 1955, we affirm the aforesaid decision of the Presiding Examiner.

In view of the fact that in these matters there is presented for the first time the question whether a sale of natural gas made before the completion of "production and gathering" (even though it was conceded that such was otherwise a sale in interstate commerce) is exempt from the Natural Gas Act (Act) by reason of the exclusionary provisions of Section 1(b) of the Act, we deem it desirable to set forth the reasons for our affirmance.

The Petitioners, Deep South Oil Company of Texas (Deep South), Humble Oil & Refining Company (Humble) and Shell Oil Company (Shell), while maintaining that their sales of natural gas are not in fact sales in interstate commerce, nevertheless claim, if their sales are found to be in interstate commerce, that the sales in question are exempt under Section 1(b).

Petitioners, Shell and Humble, further contend that their sales are sales of "casinghead gas" which is not the same product as the surplus residue gas, which they claim, is the "natural gas unmixed" to which Congress referred in the definition of natural gas in Section 2(5) of the Act.

Section 1(b) of the Act provides, in pertinent part, as follows:

The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, and to natural-gas companies engaged in such transportation and sale, but shall not apply to any other transportation or sale of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

As defined in Section 2 of the Act:

"Natural gas" means either natural gas unmixed, or any mixture of natural gas and artificial gas;

"Natural-gas company" means any person engaged in the transportation of natural gas in interstate commerce or the sale in interstate commerce of such gas for resale.

There is no merit to the claim that casinghead gas is not natural gas. The Examiner effectively answered all such claims, but it may be added that other Court cases confirm his conclusions.

In *Mississippi River Fuel Corporation* v. *Federal Power Commission*, 121 F. 2d 159, Mississippi River Fuel Corporation (Mississippi) claimed that the gas which it delivered for its purchasers is not resold for public consumption because its Purchasers, Illinois Iowa Power and Laclede Gas Companies, use it as an ingredient of a mixture which, in turn, is resold to the ultimate consumer. Mississippi urged that the resulting product burned by the consumer had only a slight similarity to natural gas.

In disposing of this contention, the Court at page 164 of its decision stated:

Natural gas is not only the gas as transported and sold, but by statutory definition natural gas is any mixture of natural and artificial gas, and hence, the send-out product as sold by the Illinois Iowa Power Company and the Laclede Gas Company is natural gas within the meaning of this act. While the natural gas resold may not be the same in identical substance as that transported, yet Congress clearly intended to regulate transactions such as here considered. It has used language appropriate to carry out that purpose. To construe the statute as contended by petitioner would limit it to so restricted a field of operation as to thwart the purpose of Congress and render the act impotent.

See also *Natural Gas Pipeline Co. of America* v. *Panoma Corporation,* 271 P. 2d 354.

Furthermore, Petitioners' sales are sales in interstate commerce for resale for ultimate public consumption and, as held by the Presiding Examiner, such sales are not within the exclusionary provisions of Section 1(b) of the Act.

The pertinent facts of record are set forth in the Examiner's decision, and although not repeated here, they show that there is an uninterrupted flow of natural gas from the wells of Deep South, Shell and Humble across State lines.

The Presiding Examiner in his initial decision refers to the testimony by Humble's principal witness, Ralph J. Schilthius, as being "sketchy and inconclusive" with respect to the movement of such gas in interstate commerce (p 56 mimeographed copy of decision). We have carefully reviewed that testimony and to us it seems most conclusive We so find. This Humble witness testified in answer to questions by Humble's counsel, that he checked with the plant operators through whose plants Humble's gas was processed and found:

(1) That the natural gas in question and sold by Humble was commingled in the processing plants with natural gas from other sources.

(2) That the commingled gas in whole or in part was sold by the plant operators to interstate pipe lines which transported that gas across State lines for ultimate public consumption.

A definite check by Humble's principal witness with plant operators as to the ultimate disposition of the commingled stream of natural gas of which Humble's gas was a part and which so satisfied Humble's witness that he was willing to testify under oath and adversely to Humble's contention and interest, as manifest in this case, cannot be taken as other than conclusive. It may well be that the testimony is not extensive nor overly detailed, but it represents the considered judgment and opinion of the witness presented by Humble respecting the ultimate disposition of the natural gas and the gas sales contracts, with which we are here concerned. We think that extended and prolix testimony could not have more decisively stated the facts than were stated in short form by this witness in the manner in which he testified.

Hence, we find that the natural gas which is sold by the Petitioners is sold in interstate commerce. The conclusion expressed in *Interstate Natural Gas Co., Inc.* v. *Federal Power Commission,* 331 U. S. 682, 688 is particularly pertinent here: "Clearly the sales in question [are] a part of commerce being carried on between points in [New Mexico and Texas] and points in other States."

We are cognizant that the following underlined language, appearing at page 685 of the *Interstate* decision raises the question whether storage or processing interrupts the continuous flow of the natural gas from the wells across the State line:

The entire movement of the gas from the wells to the purchasing companies through the compressor pumps and

across the state line is a continuous process *without interruption for storage, processing or for other purposes.*

As far as these Petitioners are concerned, there is no storage but there is processing. In every processing operation through a gasoline plant, dehydration plant or desulphurizing plant the movement of gas is uninterrupted and continuous. The gas moves into the plant in a continuous stream and flows out of the plant in an equally continuous volume. The only reduction in volume results from the removal of various elements in the process.

Moreover, the Supreme Court in *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S 265, and *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, have dispelled any doubt as to that question by holding that storage and processing do not interrupt the continuous movement in interstate commerce.

In the *Michigan-Wisconsin* case the facts were stated by the Court at page 163 of its decision as follows:

After the gas has been taken into the Michigan-Wisconsin pipes, it flows a distance of approximately 1,215 feet to a compressor station owned and operated by Michigan-Wisconsin, at which station the pressure of the gas is raised from about 200 lbs. to some 975 lbs. to facilitate movement to distant markets. In the course of its flow through this station the gas is compressed, cooled, scrubbed and dehydrated and then passes into a 24-inch pipeline which carries it 1.74 miles to the Oklahoma border and thence to markets outside Texas. Aditional motive power is furnished by 15 other compressor stations in other states through which the gas is transported.

The entire movement of the gas, from producing wells through the Phillips gasoline plant and into the Michigan-Wisconsin pipeline to consumers outside Texas, is a steady and continuous flow.

With respect to the flow of such gas, notwithstanding the scrubbing and dehydrating, the Court at page 167 of its decision stated as follows:

There is no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the state line. *United Fuel Gas Co.* v. *Hallanan*, 257 U. S 277, 281 . . .

The above statement of the Court is an apt description of the flow of the natural gas in the instant proceedings.

Even if only a portion of the gas from the Petitioners' wells crosses the State line as an integral part of a commingled mass, it is immaterial for it has been said that the smallness of the operation in interstate commerce does not take it out of the sphere of Federal jurisdiction. *Valvoline Oil Co.* v *United States*, 308 U. S 141; *Jersey Central Power and Light Co.* v. *Federal Power Commission*. 319 U. S. 61

Furthermore, the fact that the Petitioners had no control over the gas after it was sold to the gatherers or processors and that they may have been indifferent as to whether any of the gas moved in interstate commerce is not controlling on the question of whether their sales are in interstate commerce. Where the question of intent is brought into issue, such intent relates to past transaction. However, where upon investigation it is found that the sales and movement in question are generally in interstate commerce, and the inquiry relates to future operations, *the facts and not intent are conclusive*. Nor is it necessary for any of the Petitioners to intend to sell their gas in interstate commerce. Even reasonable anticipation that the gas flows in interstate commerce is sufficient. *Bracht* v. *San Antonio & A. P. R. Co.*, 254 U. S. 489. In view of the factual situation, as found by the Presiding Examiner, and confirmed by us, each of the Petitioners has knowledge that the gas it was, and is, selling in the field enters into interstate commerce. That is true not only with respect to the direct sales to the pipe lines but also with respect to the sales to the gatherers and their plant operators. The Petitioners know to whom they are selling and that the sales by their purchasers are sales of gas which move in interstate commerce.

When the gas was sold by Petitioners, it commenced its journey in interstate commerce. Nothing further remained to be done by the petitioners after those sales. Thus *Coe* v. *Erol*, 116 U. S. 571; *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172; and *Chassanoil* v. *Greenwood*, 291 U. S. 584 are not applicable to the facts before us.

We also confirm the Presiding Examiner's determination that the sales in question are sales in interstate commerce for resale and not for manufacture. Accordingly, the sales by each of the Petitioners is a sale in interstate commerce for resale.

The fact that the gas was sold by the Petitioners to an intermediary such as a gatherer or gasoline plant which, in turn, resold the gas in interstate commerce, does not affect our finding and conclusion. It is apparent from *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 681-685, Congress intended that sales of the type in question should be subject to Federal regulation and not limited to sales by pipelines to distributors. At page 682 of its decision, the Court stated:

In general, petitioners contend that Congress intended to regulate only the interstate pipeline companies since certain alleged excesses of those companies were the evil which brought about the legislation. If such were the case, we have difficulty in perceiving why the Commission's jurisdiction over the transportation *or* sale for resale in interstate commerce of natural gas is granted in the disjunctive. It would have sufficed to give the Commission jurisdiction over only those natural-gas companies that engage in "transportation" or "transportation *and* sale for resale" in interstate commerce, if only interstate pipeline companies were intended to be covered.[10] See *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464 . . . Rather, we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after

transportation by an interstate pipeline company.[10] There can be no dispute that the overriding congressional purpose was to plug the "gap" in regulation of natural-gas companies resulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural-gas business. A significant part of this gap was created by cases holding that "the regulation of wholesale sales of gas and electric energy moving in interstate commerce is beyond the constitutional power of the States." *Interstate Natural Gas Co.* v. *Federal Power Com., supra*, (331 U. S. at 689). The committee reports on the bill that became the Natural Gas Act specifically referred to two of these cases and to the necessity of federal regulation to occupy the hiatus created by them, thus, we are satisfied that Congress sought to regulate wholesales of natural gas occurring at both ends of the interstate transmission systems.

Petitioners cite our recent decisions in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179; . . . 71 S. Ct. 215, and *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190; . . . 71 S. Ct. 221, as authority for the proposition that the states may regulate the sales in question here and, hence, that such sales are not within the gap

---

[10] Just such wording was suggested to and rejected by the House Committee considering enactment of the Natural Gas Act, by the Chairman of the State of New York Department of Public Service, Public Service Commission. Hearings before House Committee on Interstate and Foreign Commerce on H. R. 4008, 75th Cong., 1st Sess. 146-147. An earlier bill, H. R. 11662, 74th Cong. 2d Sess., would have limited the jurisdiction of the Power Commission to "the transportation of natural gas in high pressure mains in interstate commerce and to natural-gas companies engaged in such transportation . . ." Much of the legislative history advanced in support of petitioners' position was developed in conjunction with this bill, including the testimony of Dozier A. De Vane, Solicitor of the Federal Power Commission. Because of the much different jurisdictional provision of H. R. 11662, such testimony has little relevance here.

which the Natural Gas Act was intended to fill. Those cases upheld as constitutional state *minimum* price orders, justified as conservative measures, applying to sales of natural gas in interstate commerce. But it is well settled that the gap referred to is that thought to exist at the time the Natural Gas Act was passed, and the jurisdiction of the Commission is not affected by subsequent decisions of this Court which have somewhat loosened the constitutional restrictions on state activities, affecting interstate commerce, in the absence of conflicting federal regulation. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 508; . . . 62 S. Ct. 384; *Federal Power Com.* v. *East Ohio Gas Co., supra* (338 U. S. at 472). The Federal Power Commission did not participate in the *Cities Service* and *Phillips Petroleum* cases, the appellants there did not assert a possible conflict with federal authority under the Natural Gas Act, and consequently we expressly refused to consider at that time "[w]hether the Gas Act authorizes the Power Commission to set field prices on sales by independent producers, or leaves that function to the states . . ." 340 U. S. at 188, 189.

Regulation of the sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from regulation of such sales when made by an affiliate of an interstate pipeline company. In both cases the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act. *Federal Power Com.* v. *Hope Natural Gas Co., supra,* (320 U. S. at 610). Attempts to weaken this protection by amendatory legislation exempting independent natural-gas producers from federal regulation have repeatedly failed, and we refuse to achieve the same result by a stained interpretation of the existing statutory language.

We wish to make it clear that our affirmance of the Presiding Exhaminer's Decision is not predicated upon

the existence or absence of state regulation with respect to wellhead prices. The degree of state regulation and state opposition to Federal control is not determinative of our jurisdiction over the sales in question. *Interstate Natural Gas Co., Inc.* v. *Federal Power Commission, supra,* and *Phillips Petroleum Co.* v. *Wisconsin, supra.*

At pages 690-1 of its decision in the *Interstate* case, the Court stated:

Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters. Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of the process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach. But such conflict must be clearly shown. Exceptions to the primary grant of jurisdiction in the section are to be strictly construed. It is not sufficient to defeat the Commission's jurisdiction over sales for resale in interstate commerce to assert that in the exercise of the power of rate regulation in such cases local interests may in some degree be affected.

At page 681 of its decision in the *Phillips* case, the Court stated:

The *Interstate* case is also said to be distinguishable in that it did not involve an asserted conflict with State regulation, and federal control was not opposed by the State authorities, while in the instant cases there are said to be conflicting State regulations, and federal jurisdiction is vigorously opposed by the producing States.

The short answer to this contention is that the jurisdiction of the Federal Power Commission was not intended to vary from State to State, depending upon the degree of State regulation and State opposition to federal control. We expressly rejected any implication to the contrary, in the *Interstate* case, 331, U. S., at 691-692. See *Federal Power Commission* v. *Hope Natural Gas Co.* • • •

Thus, it is obvious from the foregoing that our jurisdiction is not predicated upon the existence or lack of State regulation.

Our conclusions herein are fully supported by the decisions of the Supreme Court, particularly the *Phillips* case, 347 U. S. 672. In that case the Court made it plain that a sale in interstate commerce for resale within the meaning of the Natural Gas Act related to wholesale sales or sales in bulk, such as sales to interstate pipe line companies. There, in dealing with the contention that sales during production and gathering were not sales in interstate commerce within the meaning of the Act, the Court said:

• • •, we believe that the legislative history indicates a Congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company.

Further in the same decision at page 684, the Court makes is clear that any language in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, or *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190, was not to be interpreted as contrary to its conclusions and findings therein. At page 684 the Court makes that certain by stating:

Petitioners cite our recent decisions in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, and *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190, as authority for the proposition that they may regulate the sales in question here and, hence, that such sales are not within

the gap which the Natural Gas Act was intended to fill, * * * The Federal Power Commission did not participate in the *Cities Service* and *Phillips Petroleum* cases, the appellants there did not assert a possible conflict with federal authority under the Natural Gas Act, and consequently we expressly refused to consider at the time "[w]hether the Gas Act authorizes the Power Commission to set field prices on sales by independent producers, or leaves that function to the States . . ." 340 U. S., at 188-189.

The Supreme Court in its most recent pronouncement in *Natural Gas Pipeline Co.* v. *Panoma Corporation, et al.*, 349 U. S. 44, reaffirmed its prior decisions by holding:

We disagree with the contention of the appellees that *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, and *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190, are applicable here. In those cases we were dealing with constitutional questions and not construction of the Natural Gas Act. The latter question was specifically not passed upon in those cases.

The facts of record in this case, viewed in the light of the decisions of the Supreme Court interpreting the Natural Gas Act, make it plain that petitioners' sales of natural gas are sales in interstate commerce for resale and that the findings and the conclusions of the Presiding Examiner must be affirmed in accordance with this opinion.

The Commission orders:

Each of the petitions filed herein is hereby denied; the sales of each petitioner described in its petition are hereby determined to be subject to regulation under the Natural Gas Act, and each of the petitioners herein is hereby determined to be a "natural-gas company" by reason of the sales described in its petition.

By the Commission. Commissioner Digby dissenting in part and concurring in part.

LEON M. FUQUAY,
Secretary.

Adopted: September 2, 1955.
Issued: September 9, 1955.

In the Matters of: DEEP SOUTH OIL COMPANY OF TEXAS, HUMBLE OIL & REFINING COMPANY, SHELL OIL COMPANY.

Docket No. G-2952
Docket No. G-5261
Docket No. G-4671

DIGBY, Commissioner, dissenting in part and concurring in part:

I cannot agree with the holding of the majority of this Commission that the Natural Gas Act applies to *all* sales of natural gas, whether to an interstate pipeline company or not, and whether occurring before, during, or after production or gathering has been completed, solely because some or all of the gas ultimately is transported in interstate commerce or sold in interstate commerce for resale by an interstate pipeline company. The holding represents an unwarranted assumption by this Commission of power not only not delegated to it but also specifically denied to it in Section 1(b) of the Act.

That the majority opinion represents an endeavor to assure jurisdiction by this Commission over all sales of natural gas ultimately transported in interstate commerce, or sold and ultimately resold in interstate commerce is apparent from its discussion of the regulation or taxing of "*physical activities, facilities or properties used in the production and gathering of natural gas*" by a state, and the further statement in the Examiner's decision that:

"It must be concluded, therefore, that *in those instances in which a state or state commission exercises no control*

regulation or limitation upon or over the price of gas at the well head, a sale of gas produced therefrom which results in the delivery thereof into a stream of commerce in which gas produced at a point in one state is transported and sold at a point outside thereof is a sale in interstate commerce of natural gas for resale within the meaning of the Natural Gas Act, whether, before, or after, such sale there shall be extracted therefrom liquid hydrocarbons and impurities, and whether such gas shall have been dehydrated, compressed or otherwise similarly processed." (Emphasis added.)

Further, the endeavor is made equally apparent inasmuch as the Examiner bases the existence of the "gap" upon the non-existence of State or Federal regulation of the price of the gas. The "gap" is conceived to be determined by the exercise of power to fix rates rather than by existence of power. The Examiner said: "'Interstate commerce' as the term is used in the Act is, at least, coextensive with the 'gap' to which the Court referred." The basic error is in making the assumption that it is the assertion and exercise by a state of power to fix prices, rather than the existence of the power which determines the "gap".

Not only does the majority not explain away the clear error of the Examiner, but it emphasizes its error when it states: (p. 11)

> "The existence or absence of such regulation (with respect to well head prices) is not determinative of our jurisdiction over the sales in question."

Lengthy quotations from *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U. S. 682, 690, and from *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, serve only to indelibly impress how clearly inapposite is the quotation to the proposition suggested by the majority. The issue does not concern and never has concerned the degree of regulation asserted by a state or its opposition

to federal regulation; the issue concerns the existence of state power at the time the Natural Gas Act was passed.

The majority determination accords to the decision of the Supreme Court in *Wisconsin, et al.*, v. *Phillips Petroleum Co.*, 347 U. S. 672, a holding with respect to issues not before the Court. It attributes to the Court a reversal by it of specific language in *Interstate Natural Gas Company* v. *Federal Power Commission, supra*, with respect to the intended scope of Section 1(b), and it effectively rewrites the delegation of power so that the Act is now made applicable to "the sale of natural gas *for* resale in interstate commerce."

Recognition must be had that there may be and are sales made prior to completion of production or gathering whereby the gas is committed to and in interstate commerce. It would not be proper, therefore, to fix the point of completion of production and gathering as a jurisdictional determinant. The use of "business of production or gathering" as a jurisdictional criterion was specifically proscribed in the *Phillips* case. Of necessity, there must be some criteria, valid in law and capable of reasonable application by which our power shall be measured. Determination whether there has been a commitment of natural gas in interstate commerce will not only mark the beginning of the interstate commerce by practical as well as legal considerations but also permit reasonable administration of the Act and give recognition to the clear congressional intention to regulate "sales in interstate commerce for resale" as well as to the production and gathering exemption.

It is not enough to state that determination of applicability of the Act to the sales in question must recognize the extent to which Congress has asserted its power over interstate commerce and that the extent of power is not in issue. The power delegated to this Commission with respect to jurisdiction is not co-extensive with the power of Congress over interstate commerce. Our function is to

administer reasonably the Natural Gas Act within the limits of our statutory authority. Whether we believe that more effective regulation could be had with power to regulate all sales of all gas which is ultimately consumed in states other than where produced should not deter a finding of lack of jurisdiction in proper instances; nor should it cause us to make an interpretation which could only be made by a juxtaposition of the language of the statute which will permit such complete regulation.

Congress, when it enacted the Natural Gas Act, proscribed jurisdiction over all sales other than those "in interstate commerce for resale". It did not delegate power to the Commission to regulate sales "affecting" interstate commerce, sales "for" interstate commerce, or sales which may "burden" or "obstruct" or "tend to burden or obstruct" interstate commerce. The majority, however, assert jurisdiction over all such sales. Section 1(a) of the Act, the Declaration of Policy, recites that Congress acted with respect to "regulation in matters relating to the transportation of natural gas and the sale thereof *in* interstate and foreign commerce." The scope of regulatory power delegated is specifically set forth in Section 1(b) of the Act:

> "(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any *other transportation or sale of natural gas or to the local* distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

The scope of the Act must be determined by application of constitutional standards recognized at the time of enactment. In *Federal Power Commission* v. *Panhandle Eastern Pipeline Company*, 337 U. S. 498, 503, the Court said

that the Act's coverage is determingd by Section 1(b) and "does so in the light of the situation existing at the time." In *Federal Power Commission* v. *East Ohio Gas Company*, 338 U. S. 464, the Court said, with regard to the intended scope of the Act (p. 472), "but prior constitutional decisions, not what we have since decided or would decide today, form the measure of the gap which Congress intended to close by this Act. *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 508; and see *Parker* v. *Motor Boat Sales*, 314 U. S. 244, 250."

Determination of "in interstate commerce" cannot rest upon the fact that at some subsequent time some of the gas may in some way become a part of the stream of natural gas being transported or sold in interstate commerce for resale. Nor is it sufficient that at the time of sale there was an awareness that the subject matter of the sale would ultimately so move. *Bracht* v. *San Antonio & A. P. R. Co.* (54 U. S. 489) cited by the majority involved a shipment by petitioner from Ingleside, Texas, to himself at Dallas, Texas. When the goods reached Dallas he requested shipment to Kansas City. It was held that an action against the first carrier would not lie nder the Interstate Commerce Act as the shipment was purely intrastate as far as it was concerned. Yet, if the majority of this Commission is correct, the entire movement was a continuous process and the first carrier should have been engaged in interstate commerce as regards the shipment. The point at which reassignment, in our cases resale in interstate commerce to an interstate pipe line, occurs is not regarded by the majority as of any significance. The *Bracht* case emphasizes the real meaning of "interstate commerce for resale" in the Natural Gas Act.

Work or services necessary to put the subject matter in a state of preparation and readiness for transportation is not of itself work or services rendered *in* interstate commerce. The point of time or place at which the journey "in interstate commerce" begins has been held con-

sistently to be that point at which the subject matter has been "launched on its way to another State, or committed to a common carrier for transportation to such State * * *" (*Coe* v. *Errol*, 116 U. S. 517, 528).

In *Oliver Iron Mining C* v. *Lord*, 262 U. S. 172, three-fourths of the company's iron ore mining was open pit mining. Empty railroad cars were run from the railroad yards into the pits, loaded and returned to the yards, where they were hooked to trains which carried them into other states. The state levied an occupation tax on the company's mining operations. It was held that the iron ore did not enter interstate commerce until *after* the mining was completed. The handling of the railroad cars to and from the mines was held to be a part of the mining operations.

In *Chassanoil* v. *Greenwood*, 291 U. S. 584, there was involved an ordinance of the City of Greenwood which levied a tax on persons engaged in the buying and selling of cotton in that city. Chassanoil was engaged in buying cotton in Greenwood for sale and shipment to other states and counties. The cotton was grown and ginned in various parts of the state and moved to warehouses in Greenwood. There the cotton was compressed and sold on warehouse receipts to purchasers. When brokers buy the cotton they have orders for its sale and delivery in other states. It was contended that all the cotton is in interstate or foreign commerce from the moment it leaves the gin, or at least from the moment it is purchased in Greenwood by the broker. The Court held (p. 587) that, "Ginning cotton, transporting it to Greenwood, warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce, but each step *prior to the sale and shipment* is a transaction local to Mississippi, a transaction in intrastate commerce."

In *Federal Compress and Warehouse Company* v. *McLean*, 291 U. S. 17, where a license tax on the operation of

cotton compresses and warehouse in the circumstances described in *Chassanoil* v. *Greenwood* was sustained, the Court said (p. 21):

> "Its journey interstate does not begin and so it does not become exempt from local tax until its shipment to points of destination outside the state."

The fact that an article is intended for export to another state does not render it "*in* interstate commerce. *Crescent Cotton Oil Company* v. *Mississippi*, 257 U. S. 129.

These decisions must be compared with *Currin* v. *Wallace*, 306 U. S. 1, and *United States* v. *Darby*, 312 U. S. 100, wherein the issue was the permissible assertion of congressional power under the commerce clause. See also *Wickard* v. *Filburn*, 317 U. S. 111.

Federal Trade Commission v. *Bunte Brothers*, 312 U. S. 349, is illustrative of judicial recognition of the sharp line of demarcation between existence of Congressional power and exercise of that power. In that case, the Federal Trade Commission attempted to apply the Act to certain sales.

The Federal Trade Commission Act, like the Natural Gas Act, delegates power to the Commission with respect to matters "in" interstate commerce. Holding that the Commission asserted power in excess of that delegated by Congress, the Court said (p. 355):

> "An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress. The problem now before us is very different from that which was recently presented by United States v. Darby [312 U. S. 100]. We have there to consider the full scope of the constitutional power of Congress under the Commerce Clause in relation to the subject matter of the Fair Labor Standards Act. This case sents the narrow question of what Congress did, not what it intended to do. And we merely hold that to read 'unfair methods of competition' in [interstate] commerce a though it means 'unfair methods of com-

petition in any way affecting interstate commerce', requires, in view of all relevant considerations, much clearer manifestation of intention than Congress has furnished."

Eureka Pipe Line Company v. *Hallanan*, 257 U. S. 26, *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, and *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, do not provide a different criteria. In each case the subject matter related to a course of business, or transaction which was an inherent part of such business, having as its purpose transportation of goods in interstate commerce.

In the *Eureka Pipeline Co.* and *United Fuel Gas Co.* cases the State of West Virginia prohibited transportation of oil in pipelines unless a charge of 2¢ per barrel had been paid. The charge was not upon the producer but upon the pipeline company which operated a pipeline in West Virginia which connected with and transported oil to pipelines in Ohio, Kentucky and Pennsylvania. The companies were required by law to keep enough oil in tanks and pipes to satisfy credit for oil purchased but not tendered for shipment. The Court held that "the pipeline company, not the producer, was the master of the destination of any specific oil. Therefore, its intent and action determined the character of the movement from its beginning and neither the intent nor the direction of the movement changed." The charge was held invalid as a regulation of interstate commerce.

The case does not hold that each sale by the producer was in interstate commerce. It holds merely that where the business (transportation of oil) is predominately interstate, the intrastate sale of oil could not render the business intrastate. This basic principle of law has long been recognized.

In the *Dahnke-Walker Milling Company* case, plaintiff, a Tennessee flour and feed mill operator, contracted with defendant at Hickman, Kentucky, for the purchase and

sale of a crop of wheat, payment to be made in Kentucky and delivery to be on board cars of common carriers to be shipped to Tennessee. The defense asserted to an action for breach of contract was that plaintiff had not complied with a Kentucky statute imposing requirements upon a foreign corporation doing business within the state and that the contract was made in the course of intrastate business.

The Court held that the nature and purpose of the transaction was doing business in interstate commerce. It was said (p. 290):

> ". . . Where goods are purchased in one State for transportation to another, the commerce includes the purchase quite as much as it does the transportation."

Further, the Court stated (p. 291):

> ". . . In no case has the Court made any distinction between buying and selling or between buying for transportation to another State and transporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last."

The foregoing is clear recognition that the intent of the contracting parties to commit the goods in interstate commerce is a controlling factor. The contract involved in this case is a parallel to the contracts for the sale of natural gas between Humble and El Paso, which sale I hold to be in interstate commerce because there is a commitment of the gas to an interstate pipeline company.

The error of the majority in determining that the "gap" is to be measured by failure by a State to exercise power, and accordingly, holding Congressional exercise of power to embrace all sales becomes more apparent when the specific exemption of production or gathering and decisions of the Supreme Court with regard thereto are considered.

The decisions indicate that Congress intended "in interstate commerce" to refer to sales of natural gas to interstate pipeline companies for resale.

The Court, in *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, said, with respect to the evils intended by Congress to be remedied by the Act (p. 610):

> ". . . The investigation of the Federal Trade Commission had disclosed that the majority of the pipeline mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipeline transportation, had been acquired by a handful of holding companies. State Commissions, *independent producers*, and communities having or seeking the services were growing quite helpless against these combinations. These were the types of problems with which those participating in the hearings were preoccupied. Congress addressed itself to those specific evils." (Emphasis added.)

Thus, the production and gathering of natural gas was not that portion of the natural gas industry which was the source of evils sought to be remedied. Further, "The Act was drawn with meticulous regard for the continued exercise of State power, not to handicap or dilute it in any way." *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, 518. The scheme was of cooperative action between Federal and State agencies.

The Court, in *Colorado Interstate Gas Company v. Federal Power Commission*, 324 U. S. 581, did not pass on the issues here presented. It did hold that the Section 1(b) exemption was to be given meaning. It stated (p. 603) that the "provision precludes the Commission from any control over the activity of producing or gathering natural gas."

In *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U. S. 498, the Commission sought to restrict the production and gathering exemption to

purely physical activities of production and gathering. The Court held, however, (p. 504) that such a narrow meaning could not be ascribed to the words.

The Court, in *Interstate Natural Gas Company* v. *Federal Power Commission, supra*, recognized (p. 690) that there are sales "though technically consummated in *interstate* commerce," which may be "made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions" that the jurisdiction of the Federal Power Commission does not attach. (Emphasis added.)

The majority of this Commission, however, refuses to recognize the existence of any sales of natural gas which is ultimately resold *in interstate commerce* which are not subject to the jurisdiction of the Commission. The *Phillips* decision did not disapprove or negative the language of a unanimous Court in the *Interstate* case. To the contrary, it cited and relied upon the case as controlling.

Acceptance of the hypothesis of non-jurisdictional sales in production and gathering defeats the hypothesis or assumption of the completeness of Commission jurisdiction with regard to all sales of natural gas where at least some portion of such gas eventually finds its way into the full-stream of interstate commerce in the transmission lines of an interstate transmission pipeline company.

The *Interstate* case, as such, merely holds, as does the *Phillips* case, that sales *by a producer to an interstate pipeline company* are subject to regulation under the Act.

In *Interstate Natural Gas Company* v. *Federal Power Commission, supra*, the nature of the purchases for sales was described as follows (pp. 684-5):

"Gas produced from petitioner's wells flows into petitioner's system of field pipe lines, moving first into branch lines, then into trunk lines, and finally into the main trunk

lines from which delivery is made to the three purchasing companies. During the course of this movement, petitioner purchases gas from other producers in the field which gas is introduced into petitioner's system at designated points and is there commingled with the gas moving from petitioner's own wells. By far the larger part of the gas so purchased by petitioner has been gathered from various wells of the selling companies before delivery to petitioner is made. The gas moves through petitioner's system at well pressure. Shortly after the sales in question are completed, the gas is directed through the compressor stations of the purchasing companies and is there subjected to increased pressure in order that it may be moved to markets as far distant as Illinois. The entire movement of the gas from the wells to the purchasing companies through the compressor pumps and across the state lines is a continuous process without interruption for storage, processing or for any other purpose. All the gas sold in these transactions is destined for ultimate public consumption in States other than Louisiana."

With respect to such sales, the Court concluded (p. 688):

> "Clearly the sales in question were a part of commerce being carried on between points in Louisiana and points in other States. There is nothing in that language to suggest that Congress intended that sales consummated before the gas crosses a State line should not be regarded as being 'in' such commerce."

Regarding production and gathering, the Court said (p. 692):

> "The gas moved by petitioner to the points of sales consisted of gas produced from petitioner's wells commingled with that produced and gathered by other companies and introduced into petitioner's pipeline system during the course of the movement. By the time the sales are consummated, nothing further in the gathering process remains to be done. We have held that these sales are in interstate commerce. It cannot be doubted that their regulation is predomi-

nantly a matter of national, as contrasted to local concern."

Speaking with respect to the *Interstate* case, the Court in the *Phillips* case remarked (pp. 680-1), that it had based its decision "on the broader ground that sales *in interstate* commerce for resale by producers *to interstate pipeline companies* do not come within the 'production or gathering' exemptions." (Emphasis supplied.)

The Supreme Court in *Natural Gas Pipe Line Company of America* v. *Panoma Corporation*, 349 U. S. 44, decided April 11, 1955, clearly evidenced the intended holding of the *Phillips* case when it stated:

> "In this case Oklahoma has attempted to fix a minimum price *to be paid for natural gas, after its production and gathering has ended, by a company which transports the gas for resale in interstate commerce.* We held in Phillips Petroleum Company v. Wisconsin, 347 U. S. 672, 74 S. Ct. 792, 98 L. Ed. 1035, that such a sale and transportation cannot be regulated by a State but are subject to the exclusive regulation of the Federal Power Commission. The Phillips case, therefore, controls this one." (Emphasis supplied.)

The majority, however, seeks to read into that decision a determination of issues not before the Court.

The foregoing considerations lead to but one logical conclusion, *viz.*, that the sales intended to be embraced by the Natural Gas Act are those by which natural gas is committed to interstate commerce. Otherwise, Congress has asserted its power over interstate commerce to the fullest as regards all matters incident to production or gathering save the regulation of the physical production and protection of correlative rights. This the Supreme Court has held it did not do.

The instant proceedings present for determination the jurisdictional status of several types of sales of natural gas.

The petition of Humble Oil & Refining Company seeks status determination with respect to sales of casinghead gas. The sales may be divided into three appropriate categories:

(1) Sales to a plant operator not an interstate transmission company under a standard casinghead gas contract (Ex. 26);

(2) Sales to an interstate pipeline company (El Paso Natural Gas Company) under the El Paso form of casinghead gas contract (Ex. 27); and

(3) Sales to a producer and gatherer not also an interstate transmission company pursuant to division orders (Ex. 28).

The petition of Shell Oil Company seeks status determination with respect to sales of casinghead gas and gas well gas. The sales may be divided into three appropriate categories:

(1) Sales of casinghead gas to a producer and gatherer not also an interstate transmission company (Phillips Petroleum Company).

(2) Sales of casinghead gas to one who is or upon commencement of sales will be an interstate transmission company (Texas Gas Pipeline Corporation); and

(3) Sales of gas well gas to one who is or upon commencement of certain sales will be an interstate transmission company (Texas Gas Pipeline Corporation).

The petition of Deep South Oil Company of Texas seeks status determination with respect to sales of casinghead gas and full-stream gas. The sales may be divided into three appropriate categories:

(1) Sales of casinghead gas to a producer and gatherer not also an interstate transmission company (Texas Gas Corporation);

(2) Sales of full-stream gas to a producer and gatherer not also an interstate transmission company (Texas Gas Corporation); and

(3) Sales of gas from a gas distillate well to one who is an interstate pipeline transmission company (United Gas Pipe Line Company).

(3) Sales of gas from a gas distillate well to one who is an interstate pipeline transmission company (United Gas Pipe Line Company).

The sales made by Humble covered casinghead gas, or gas produced in association with oil from oil wells. Humble's typical operations for producing raw casinghead gas include the passage of the mixture of oil and gas which issues from the wellhead through flow lines from the respective wells to the lease separator. The crude oil and heavier liquids settle to the bottom of the separator and are drained off leaving a gaseous mixture of hydrocarbons known as raw casinghead gas.

We are here concerned only with the disposition of the casinghead gas, the principal component of which is methane (Tr. 137), the same material which constitutes fuel gas, the bulk of gas in interstate transmission lines (Tr. 138, 376). The record is replete with testimony establishing that safe and efficient movement of the gas through transmission lines requires that the compound be processed to remove those elements and that casinghead gas cannot be compressed and transported to the markets until this has been done. In addition, the various hydrocarbons constituents of the casinghead gas have intrinsic value which makes their recovery economically desirable (Tr. 376). Only the residue gas, composed principally of methane, is suitable for domestic and industrial use (Tr. 376).

Humble, in each of the 48 transactions under consideration, disposes of the casinghead gas by sale and delivery thereof through a meter at or near the lease separator.

The commodity sold and delivered to the purchaser at this point is a gaseous compound made up of numerous hydrocarbons. The price to be paid for the casinghead gas is based upon the amounts received by the processor from his sale of the liquid products recovered from the compound plus a portion of the net proceeds from his sale of any remaining residue gas.

The casinghead gas at the point of delivery passes into the "plant gathering lines" of the purchaser, and moves, commingled with casinghead gas from other leases, into a gas processing plant. In the plant the mass of casinghead gas is put through various mechanical and chemical operations which result in the segregation of the various hydrocarbon constituents and the removal of objectionable impurities and foreign material from the residue gas. The residue gas or methane is then ready for delivery to market.

All of the casinghead gas sold by Humble follows the above-outlined course from the wellhead to the outlet of the processing plant. The categorical differentiation noted at the outset arises from differences in the type of purchaser and differences in the type of contract of sale.

In the first category, covering 36 sales, the purchaser is a plant operator, engaged in the business of purchasing and at times producing casinghead gas, gathering and processing said gas, and selling the resulting products at the outlet of the plant. The sales to the plant operator are made pursuant to Standard Form Casinghead Gas Contracts (Ex. 26; Tr. 396). Title and control pass at the point of delivery, at or near the lease separator, with the exception of two deliveries which are made 2,000 or 3,000 feet from the separator on or adjoining Humble's lease (Tr. 397). Consideration is based upon the proceeds received from the plant operator's sales, and the richness and volume of casinghead gas delivered from the lease (Tr. 398). Disposition of the residue gas is not within the control of Humble. The purchaser may dispose of such

gas as it pleases. It may commit some or all of the gas "in interstate commerce" or it may not.

This sale precedes gathering, processing and recovery of the merchantable fuel gas product which is fit to be committed to interstate transmission; it precedes the sale which does commit some or all of such gas in interstate commerce. It cannot be said to be a "sale *in* interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use * * *." Such sale is patently not the type of sale held by the Supreme Court to be within the scope of the Natural Gas Act in the *Phillips* and *Interstate* cases.

The second category covers sales to an interstate pipeline company (El Paso Natural Gas Company) pursuant to a contract known as the El Paso form of casinghead gas contract (Ex. 27). The interstate pipeline company owns and operates the processing plant and has the right under the contract to take all surplus residue gas resulting from said processing into its pipe line. The revenue to be received by the producer for the casinghead gas is arrived at in substantially the same manner as in the Standard Form Casinghead Gas Contract, the exception being that the revenue to be received for sales of residue gas is a fixed amount depending upon the depth of the producing formation and the date of taking. Title and control pass at the point of delivery at or near the lease separator.

The distinguishing feature of the sales to El Paso is the contractual provision whereby all residue gas is committed to interstate transmission. A sale of this type, made pursuant to a contract executed between a working interest owner, or a lease or unit operator having power under an operating agreement to make such sale, and an interstate transmission pipeline company whereby the gas is committed to the interstate transmission system, appears to be the type of sale contemplated by the Natural Gas Act as interpreted by the *Phillips* decision, 347 U. S. 672, and, therefore, subject to the jurisdiction of the Commission.

The third category of Humble's transactions covers the sale by a lease operator of gas attributable to non-operating working interests owned by Humble. These sales are made pursuant to division orders. The particular division order here is known as the Phillips division order and authorizes the lease operator to dispose of, either by purchase or sale, Humble's share of casinghead gas along with other casinghead gas produced from the lease (Ex. 28). The lease operator in these instances contracts with the purchaser, a plant operator not engaged in interstate transmission, for the sale of all casinghead gas produced from the lease. Humble's transactions in connection therewith, not being a commitment into an interstate transmission system, would also fall outside the scope of the Natural Gas Act.

Shell Oil Company is seeking status determination with respect to sales of both casinghead gas and gas well gas. These sales fall into three categories.

The first category covers sales of casinghead gas produced from 19 oil wells in the McElroy Field, Crane and Upton Counties, Texas. The operations necessary to the production of this casinghead gas are substantially the same as those hereinbefore outlined in describing Humble's sales of casinghead gas. Shell sells to Phillips Petroleum Company, which gathers and processes the casinghead gas produced from Shell's leases, together with casinghead gas from other leases. Delivery is made through a meter adjacent to the separator on the Shell lease (Ex. 11). Phillips, after processing, markets the products and residue gas in both intra and interstate commerce.

This sale by Shell is analogous to the sales in the first category by Humble, and, therefore, falls within the same jurisdictional ruling, *i.e.*, not subject to the jurisdiction of the Commission.

Shell also proposes to make sales of gas produced in the Nome Field, Jefferson County, Texas, to Texas Gas Pipe Line Corporation, an interstate transmission company (Tr. 117). The sales from this field to Texas Gas Pipe Line have been hereinbefore categorized as two distinct

types of sales, one covering casinghead gas and the other covering gas well gas. However, since both types of sales are covered by one contract (Ex. 9), they should be treated as one category.

It is significant in an analysis of Shell's sale of gas, both casinghead and gas well gas, to Texas Gas Pipe Line to note that Texas Gas Pipe Line Corporation is a subsidiary of Texas Gas Corporation (Tr. 85, 99). The parent company in this instance owns the processing plant through which the gas to be purchased by Texas Gas Pipe Line must flow to be processed and prepared for the interstate transmission and ultimate industrial and domestic use (Tr. 100).

By the terms of the gas sale contract between Shell Oil Company, as Seller, and Texas Gas Pipe Line Corporation, as Buyer, Shell "commits" to the performance thereof all of its "interest in gas in the non-associated gas reservoirs and in the associated gas or gas caps and the casinghead gas to be produced from the oil reservoirs situated in the Nome Field * * *." (Ex. 9) Thus, Shell's sales from the Nome Field are to an interstate transmission pipeline company, and, being committed to interstate commerce, are within the class of sales hereinbefore indicated as properly jurisdictional.

Deep South produces gas from both distillate and oil wells in the Big Hill Field, Jefferson County, Texas, which it sells to Texas Gas Corporation. Gas from a distillate well is known as "wet gas" or "full stream gas." It differs from casinghead gas principally in that it contains hydrocarbons of such nature that they condense at normal atmospheric pressure, whereas casinghead gas is produced in association with oil.

Texas Gas Corporation, the purchaser of gas produced by Deep South from the Big Hill Field, is engaged in the business of gathering and processing gas in the State of Texas, for resale to both intra and interstate transmission pipe-line companies. It owns and operates extensive facilities in this connection all within the State of Texas.

The sale by Deep South to Texas Gas Corporation of both casinghead and full stream gas is made pursuant to a single gas purchase contract. (Ex. 13) The contract provides for delivery at the well and for a fixed price for Mcf for "separator overhead gas".

Deep South's reserves are dedicated to the performance of this contract, but title and control pass to Texas Gas Corporation at the point of delivery. The record indicates that Texas Gas Corporation without knowledge or consent of Deep South subsequently dedicated (committed) the reserves covered by its contract with Deep South to the performance of Texas Gas Corporation's contract of sale to Texas Eastern Transmission Company, an interstate transmission pipe-line company. (Tr. 189-191).

The above described sale by Deep South, though hereinbefore divided into two categories, may be treated as one for the purpose of status determination. It is comparable to the sales in the first category by both Humble and Shell and the status determination thereof is controlling this sale by Deep South, *i.e.*, non-jurisdictional.

The third category of sales by Deep South covers production from a gas distillate well in the Refugio Field, Refugio County, Texas, which is sold to United Gas Pipe Line Company, an interstate transmission pipe line company. The contract under which this sale is made (Ex. 16) provides for delivery at an appropriate point on United's line and for payment at a fixed price per Mcf. Delivery is made at the edge of Deep South's lease (Tr. 335), about 500 to 600 feet beyond the separator. (Tr. 347). United then moves the gas to a plant for processing after which it moves the residue gas to its compressor station at Refugio (Tr. 336). The record shows that the commingled gas stream that moves out of the compressor station goes into United Gas Pipe Line's "system" (Tr. 349 and 350). No evidence was offered relative to United's system. In this respect the majority properly conclude that the burden was upon Deep South to establish that the gas so sold was not transported or sold in interstate commerce for resale.

This sale made pursuant to a contract by which Deep

South "commits" its gas to an interstate transmission pipe-line company is analogous to Humble's sale to El Paso and Shell's sale to Texas Gas Pipe Line Corporation, and must receive similar jurisdictional determination.

Having regard for the history of the legislation, the existing evils sought to be remedied thereby, the intention not to invade the power of the several states, the very pertinent language of the Court in the *Panhandle* cases, particularly 337 U. S. 498, the *Interstate* case and *Colorado Interstate* case, it must be concluded that Congress did not intend "in interstate commerce" to embrace in all instances the movement of the methane through the sands toward the well bore, through the well pipe, separators, dehydrators, scrubbers, and many other pieces of processing equipment, the outlet side of a processing plant into a transmission line of the interstate transmission company and on the the ultimate burner tips.

The majority has determined that, in every instance where it can be demonstrated that any part of natural gas sold as a well head may become a part of a commingled stream which crosses a state line, the sale of the entire amount is a sale in interstate commerce for resale. Great reliance is placed upon the testimony of Mr. Schilthuis, a witness for Humble Oil & Refining Company; it is said (p. 4) that his testimony is "most conclusive". It is conclusive only that at some future time some other company may effect a sale of some part of the gas to an interstate pipe-line company. The issue is whether the sale itself is in interstate commerce, not whether some subsequent sale is in interstate commerce.

It is clear that Congress intended there should be a line of demarcation having a penumbra of sufficient breadth to permit reasonable administration of the Act in the public interest without effectively negating the exemption of production or gathering and, at the same time, to give full recognition and effect to the salutary purposes of the Act. Certainly, it would appear proper to hold that in those instances where sales of natural gas are made pursuant to a

contract executed by and between the owner of a working interest, or by an operator pursuant to power contained in an operating agreement, and an interstate pipe line transmission company, there has been a commitment of natural gas "in interstate commerce" for resale and the jurisdiction of the Commission attaches. Also, in those instances where sales of natural gas are made pursuant to a contract executed by the owner of a working interest or by an operator pursuant to power in an operating agreement, dedicating his share of all natural gas to be produced from designated reserves to an interstate pipe-line transmission company, there has been a commitment of natural gas "*in* interstate commerce" and the jurisdiction of the Commission attaches.

The broad language in the *Phillips* case, *viz.*, "Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during or after transmission by an interstate pipe-line company", cannot properly be considered as holding that the flow of natural gas from the sands and through the well is "in interstate commerce" and thus the sale at the wellhead is, in all instances, a sale in interstate commerce for resale, merely because some portion or all of the gas may ultimately find its way into the interstate pipe-line transmission company's lines. To so hold effectively rewrites pertinent Sections of the Act to redefine our jurisdiction to encompass "sales of natural gas for resale in interstate commerce" or "sales of natural gas ultimately resold in interstate commerce."

. . . . . .

(S. L. Digby),
Commissioner.

Filed: September 2, 1955.

Issued: September 9, 1955.

Excerpt from the Natural Gas Act. (15 U. S. C. 717b) § 1(b):

"The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."